EDITOR'S NOTE

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. 85-1658-AFX
atus: GRANTED

Title: Federal Communciations Commission, et al., Appellants
v.
Florida Power Corporation, et al.

cketed:
ril 9, 1986

Court: United States Court of Appeals for the Eleventh Circuit

de:
85-1660

Counsel for appellant: Solicitor General

Counsel for appellee: Fujimoto, Shirley S., Topol, Allan J., Wright, Daniel J.

try	Date	Note	Proceedings and Orders
1	Jan 29 1986		Application for extension of time to docket appeal and order granting same until March 10, 1986 (Powell, January 31, 1986).
2	Feb 28 1986		Application for further extension of time to docket appeal and order granting same until April 9, 1986 (Powell, March 3, 1986).
3	Apr 9 1986	G	Statement as to jurisdiction filed.
4	Apr 9 1986		Brief amicus curiae of Texas Cable TV Assn., et al. filed.
5	May 9 1986		Motion of appellees Florida Power Corp., et al. to affirm filed. VIDED.
6	May 9 1986		Brief amicus curiae of Arizona Cable Television Assn., et al. filed.
7	May 9 1986		Brief amicus curiae of NY State Cable Assn., et al. filed.
9	May 13 1986		DISTRIBUTED. May 29, 1986
0	May 13 1986		REDISTRIBUTED. May 29, 1986
1	Jun 2 1986		PROBABLE JURISDICTION NOTED. The case is consolidated with 85-1660, and a total of one hour is allotted for oral argument.
			**
3	Jul 10 1986		Order extending time to file brief of appellant on the merits until July 29, 1986.
4	Jul 24 1986		Brief amicus curiae of Nor-West Cable Communications filed. VIDED.
5	Jul 28 1986		Brief amicus curiae of Texas Cable TV Assn., et al. filed.
6	Jul 28 1986		Joint appendix filed. VIDED.
7	Jul 29 1986		Brief of appellants FCC, et al. filed. VIDED.
8	Aug 1 1986		Record filed.
9	Aug 1 1986		Certified copy of original record and proceedings, 6 volumes, received. (Box).
0	Aug 8 1986	G	Motion of the Solicitor General for divided argument filed.
1	Aug 25 1986		Brief amicus curiae of Pacific Legal Foundation filed. VIDED.
2	Aug 28 1986		Brief amicus curiae of Edison Electric Institute filed. VIDED.
3	Aug 29 1986		Brief amicus curiae of American Railroads filed. VIDED.
4	Aug 29 1986		Brief of appellee Florida Power Corp. filed. VIDED.
5	Aug 28 1986		Brief of appellee Tampa Electric Company filed. VIDED.

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try	Date	Note	Proceedings and Orders
6	Aug 30 1986		Brief of appellees Alabama Power Co., et al. filed. VIDED.
7	Aug 29 1986		Brief amicus curiae of Mt. States Telephone & Telegraph, et al. filed. VIDED.
5	Sep 12 1986		CIRCULATED.
9	Sep 24 1986		Motion of the Solicitor General for divided argument GRANTED.
0	Oct 6 1986		SET FOR ARGUMENT. Wednesday, December 3, 1986. This case is consolidated with No. 85-1660. (2nd case) (1 hr.)
1	Dec 3 1986		ARGUED.

85-1658

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, APPELLANTS

v.

FLORIDA POWER CORPORATION, ET AL.

*ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Pole Attachments Act of 1978, 47 U.S.C. 224, which regulates the rates that cable television operators can be charged by those who have permitted the attachment of the cable operators' wires to their utility poles, effects a taking under the Fifth Amendment.

2. Whether, if so, the Act violates the Fifth Amendment because it empowers an administrative agency to calculate just compensation for a taking.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following parties participated in the proceeding before the Eleventh Circuit: Group W Cable Inc. (successor in interest to Teleprompter Corporation), National Cable Television Association Inc., Cox Cablevision Corporation, Tampa Electric Company, Mississippi Power & Light Company, Alabama Power Company, Arizona Public Service Company, and Acton Corporation.*

* Group W Cable, National Cable Television, Cox Cablevision, and Acton Corporation [redacted] filed a notice of appeal from the decision below.

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Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, APPELLANTS

v.

FLORIDA POWER CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 772 F.2d 1537. The memorandum opinions and orders of the Federal Communications Commission and its Common Carrier Bureau (App., *infra*, 21a-28a, 29a-35a, 36a-47a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1985 (App., *infra*, 48a-49a), and re-

hearing was denied on November 12, 1985 (App., *infra*, 50a-51a). A notice of appeal was filed on December 10, 1985 (App., *infra*, 52a-53a). On January 31, 1986, Justice Powell extended the time for docketing an appeal to and including March 10, 1986, and on March 3, 1986, he further extended that time to and including April 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part: "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The text of the Pole Attachments Act, 47 U.S.C. 224, is set forth at App., *infra*, 54a-56a.

STATEMENT

1. Cable television service requires the transmission of video programming from a central location to subscribers' television sets through the use of coaxial cables and other transmission equipment. Financial, environmental, and local franchise constraints typically require cable companies to utilize space available on existing poles of telephone or electric power companies to string their cables (S. Rep. 95-580, 95th Cong., 1st Sess. 12-14 (1977)). Accordingly, cable companies historically have entered into leasing agreements with utilities for the rental of space on their poles for a periodic fee. Conflicts arose, however, over the fees charged; the cable operators contended that the utilities exploited their superior bargaining position—resulting from the ownership of the poles

and the operators' lack of any alternative placement options—to demand exorbitantly high fees (*id.* at 13).

Since the states had generally not asserted regulatory authority over the pole attachment policies of the utilities (S. Rep. 95-580, *supra*, at 14), the cable operators sought relief from the Federal Communications Commission. The Commission, however, concluded (in *California Water & Telephone Co.*, 40 Rad. Reg. 2d (P&F) (1977)) that it lacked authority under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, over pole attachment rates.

Thereupon, Congress in 1978 enacted the Pole Attachments Act, 47 U.S.C. 224, to "resolve this jurisdictional impasse, by creating within the FCC an administrative forum for the resolution of CATV pole attachments disputes and by prompting the several States, should they wish to involve themselves in these matters, to develop their own plans free of Federal prescriptions" (S. Rep. 95-580, *supra*, at 14).

The Pole Attachments Act directs the FCC to "regulate the rates * * * for pole attachments to provide that such rates * * * are just and reasonable" (47 U.S.C. 224(b)), unless the state regulates such matters and provides the Commission with an appropriate certification to that effect (47 U.S.C. 224(c)). The statute defines a "just and reasonable rate" as one which provides for the recovery of not less than the additional costs of providing the attachments (the incremental costs) or more than the proportional share of the capital and operating expenses of the pole (the fully allocated costs). 47 U.S.C. 224(d)(1). See S. Rep. 95-580, *supra*, at 19-21.[1]

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[1] The statute originally limited the effectiveness of the statutory formula to five years (47 U.S.C. (Supp. II 1978) 224

The legislative history specifically points out that no utility is required by the statute to make space available for cable attachments (S. Rep. 95-580, *supra*, at 15-16, emphasis added):

> [T]he Commission's jurisdictional reach extends only to those entities which participate in the provision of communications space on utility poles. Thus, an electric power company which owns or controls a utility pole would be subject to FCC jurisdiction only if two preconditions are met: (1) the power company shares its pole with a telephone company, or other communications entity; and (2) a cable television system shares the communications space on the pole with the telephone utility or other communications entity, or occupies the communications space alone. An electric power company owning or controlling a pole on which no communications space has been designated would not be subject to FCC jurisdiction. [*The Act*] *does not vest within a CATV system operator a right to access to a utility pole, nor does* [*the Act*] *require a power company to dedicate a portion of its pole plant to communications use.*

2. This case arose out of three contracts entered into by appellee Florida Power Corporation (FPC) for the lease of space on its poles to cable television companies. The contracts were made in 1963 (with Cox Cablevision Corporation), 1977 (with Teleprompter Corporation) and 1980 (with Acton CATV Inc.), and provided for annual pole rates ranging

(e)). That limitation was deleted in 1982 (Communications Amendments Act of 1982, Pub. L. No. 97-259, § 106, 96 Stat. 1091).

from \$5.50 in 1963 to \$7.15 in 1980 (App., *infra*, 3a, 5a-7a).[2]

Teleprompter filed a complaint with the FCC on November 18, 1980, pursuant to the Pole Attachments Act, alleging that the contract rates of \$6.51 per pole for 1981 and \$6.79 for 1982 were unfair. Acton filed a similar complaint on February 21, 1981, challenging its \$7.15 per pole contract rate (App., *infra*, 5a-6a). On July 16, 1981, the Commission found that, in each case, an annual per pole rate of \$1.79 was the maximum rate that was just and reasonable (*id.* at 7a, 44a). While this decision was pending on agency review, Cox filed its complaint; on March 8, 1982, the Commission applied to Cox its conclusion that \$1.79 per pole was the maximum just and reasonable rate for FPC's poles (*id.* at 7a, 33a). The applicaitons for review were denied by the agency on September 28, 1984 (*id.* at 8a, 21a-28a).

3. Appellee FPC petitioned for review of the final Commission order, pursuant to 47 U.S.C. 402(a).[3] It alleged that the Commission's order amounted to a taking of its property without just compensation, and asked the court of appeals to set aside that order and remand the case for the Commission "to provide constitutionally just compensation" (FPC C.A. Br. 54).

[2] The contract rate provisions are summarized at App., *infra*, 30a n.1, 38a n.2.

[3] That section provides, by reference to Chapter 158 of Title 28, for review of agency decisions of this kind in the court of appeals where the petitioner resides or in the United States Court of Appeals for the District of Columbia Circuit (28 U.S.C. 2342(1), 2343). Since the FPC resides in the Eleventh Circuit, the petition was filed there.

The court of appeals concluded that *Loretto* v. *Teleprompter-Manhattan CATV Corp.*, 458 U.S. 419 (1982), compelled the conclusion that the presence of cable TV wires on FPC poles constituted a physical invasion, and thus a taking of FPC property under the Fifth Amendment (App., *infra*, 14a). The court did not, however, reach FPC's claim that the rate prescribed by the Commission was constitutionally inadequate. It decided instead that the determination of just compensation is "solely within the parameters of the judicial function" (*id.* at 15a), and may not constitutionally be delegated at any stage to a nonjudicial agency. The court accordingly held that the Pole Attachments Act was unconstitutional because it "does not properly allow for a judicial determination of just compensation" and instead permits that determination to be "made by an administrative agency at the behest of Congress" (*id.* at 19a).

THE QUESTIONS ARE SUBSTANTIAL

The court of appeals has declared unconstitutional a statute designed by Congress to protect one industry from overreaching by another. The Pole Attachments Act reflects the legislative judgment that federal regulation of the rates charged by utility pole owners was necessary in order to prevent the exploitation of their monopoly power in a way that so drained the resources of cable television companies that it threatened the development of valuable and innovative communication resources throughout the nation.[4] In exercising "the grave power of annulling

[4] The difference between the utility-imposed rate of $7.15 a pole and the Commission-approved rate of $1.79 suggests that the danger of exploitation is real.

an Act of Congress" (*United States* v. *Gainey*, 380 U.S. 63, 65 (1965)), the court below has deprived the cable companies of the congressionally provided means for the resolution of their challenges to utility-imposed rates, thus exposing them to precisely the injuries Congress sought to avoid. The court's decision is based on a misinterpretation of a recent decision of this Court and overturns long-standing perceptions about the scope of regulatory authority.

1. The court of appeals erroneously concluded that the Pole Attachments Act effects a taking of appellee's property.

a. It is too late in the day for any serious contention that the regulatory rate-making function is subject to a Just Compensation Clause challenge simply because it limits the return that the regulated entity could recover in the absence of regulation. Instead, it is entirely clear that "[r]egulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness." *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968). Accord, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944). So long as the rates established are not confiscatory, there is no viable objection based on the Just Compensation Clause. *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51 (1936); *Permian Basin Area Rate Cases*, 390 U.S. at 769-770. Ignoring these principles, the court of appeals found it unnecessary to consider whether the rates established were confiscatory, and instead concluded that the Pole Attachments Act unconstitutionally authorized a taking of appellees' property.

Of course, the Commission does not have general rate-making authority with respect to appellees, and

the court below specifically reserved the question of the extent of the power of a "state agency charged with the responsibility of regulating the power company as a public utility" (App., *infra*, 20a). But surely such an agency could, under the authorities cited above, establish reasonable rates to be charged by appellees for pole attachments as a part of its general rate-making authority without running afoul of the Just Compensation Clause.[5] The utility's total annual revenue is typically fixed by the state agency to reflect its perceived overall revenue requirements. Funds derived from pole attachment fees help defray costs that would otherwise be borne by the utility's customers. The determination of the proper allocation of costs between different kinds of utility customers is the essence of the business of utility regulatory agencies. In this context, the cable companies are in effect simply another kind of customer, and state regulation of the rates charged them by the utilities would be no less consistent with the Just Compensation Clause than is any other component of the state rate regulation scheme. The Just Compensation Clause is not implicated simply because Congress has provided for federal regulation to fill a perceived regulatory gap,[6] and thereby has rounded

[5] Alternatively, if the regulation of the attachment fees were imposed by a local authority as a condition of permitting the utility to construct its poles on public property in the first instance, there could scarcely be a legitimate "taking" claim.

[6] Indeed, the Pole Attachments Act expressly provides that the FCC's rate-making authority in this area exists only in the absence of the exercise by the state of such rate-making authority (47 U.S.C. 224(c)(1)).

out the state's scheme of utility rate regulation in a way that the state was free to do itself.[7]

b. Contrary to the conclusion of the court of appeals, this Court's decision in *Loretto* v. *Teleprompter-Manhattan CATV Corp.*, 458 U.S. 419 (1982), does not require a different result. Perhaps most significantly, the petitioner asserting a property interest in *Loretto* was the owner of an apartment building, not a regulated utility. Loretto's claim to exclude unwanted intrusions onto her building thus implicated the fundamental concerns of the Just Compensation Clause. These concerns are far more attenuated here, where appellees simply object to the regulation of rates they charge for permitting an additional set of wires to be strung on poles they themselves use for precisely that purpose, and only for that purpose.

Moreover, the Pole Attachments Act, unlike the state law at issue in *Loretto*, gives the cable company no right to attach anything to the property of another. The federal Act applies only in those situations where the utility has agreed to give the cable company access to its property; it simply permits the FCC to review the conditions of that agreement to assure that it is fair to both parties.[8] While the

[7] Moreover, since the Act directs the Commission to establish "just and reasonable" rates, it evidently comprehends the power to raise, as well as lower, rates. Such an enactment is on its face an exercise of the regulatory power, rather than the taking power.

[8] We note that in 1984, Congress amended the statute to ensure that franchised cable operators would be authorized to use public rights of way and easements. Pub. L. No. 98-549, § 2, 98 Stat. 2786, added 47 U.S.C. (Supp. II) 541(a)(2), which provides that:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way,

landlord in *Loretto* could point to a clear interference with her right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property" (*Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979)), appellees here freely chose to contract away that right with respect to the cables at issue. Their objection is simply to the regulation of the terms of the agreed occupation. They assert the "right" to be free of regulation—a far more attenuated right.[9]

The court below nevertheless concluded that "the cable companies' occupation of Florida Power's poles

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and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—

* * * * *

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

The precise scope of this new provision is unclear and has not yet been considered by the Commission. The 1984 amendment is, of course, not at issue in this case, in which access was granted as a matter of choice by the utilities.

[9] Compare *Delaware, L. & W.R.R.* v. *Morristown*, 276 U.S. 182 (1928), with *Hilton Washington Corp.* v. *District of Columbia*, 777 F. 2d 47 (D.C. Cir. 1985). In *Morristown*, the Court declared an ordinance to be invalid under the takings clause because it required a railroad company to set aside a portion of its property for use as a regulated taxicab stand. In *Hilton*, however, regulation of a hotel's taxicab stand was sustained despite a *Loretto*-based attack because there was no governmental compulsion to establish the stand in the first place. Thus, the regulation of the stand was deemed to be an acceptable restriction on its use rather than a taking of hotel property.

at the rate specified by the FCC is anything but invited" (App., *infra*, 11a), and refused to attach any significance to the fact that FPC had made no efforts to exclude any cable company's wires (*id.* at 11a-12a).[10] Rate regulation, of course, is not transformed into a taking merely because the regulated utility would prefer to charge higher rates. And the court overlooked the fact that at least one of the contracts involved here was first made two years after the enactment of the Pole Attachments Act,[11] and that FPC continued to invite the use of its poles by cable companies in full awareness of the fact that the terms of its contracts were subject to review by the FCC to assure that the fees charged were just and reasonable.[12] The record in this case thus persuasively dem-

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[10] The court's doubt about the extent of a utility's power to terminate an agreement involves issues that are unclear under the Act. See S. Rep. 95-580, *supra*, at 16. Nothing in this record supports the court's speculation that FPC's failure to attempt a termination was due to a belief that the FCC would not permit it. Since FPC never attempted to terminate the agreement, any claim of a taking based on inability to terminate is not ripe for review. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, No. 84-4 (June 28, 1985), slip op. 13-20; cf. *Agins* v. *Tiburon*, 447 U.S. 255, 262-263 (1980). However, even if FPC had such a belief and it were correct, we do not believe that would be conclusive, for the reasons explained above.

[11] The Acton contract was entered into on June 16, 1980; the Act was enacted in 1978 (App., *infra*, 4a, 6a).

[12] The Teleprompter contract was finalized on July 1, 1977 (App., *infra*, 5a), while the Act was under consideration (*id.* at 4a). Although the Cox contract was initially made in 1963, it provided for a term of at least one year, and was thereafter terminable at will by either party on six months' notice (Nov. 2, 1981 Cox Cablevision Compl. Attach A, § 12.1). Thus, FPC was on notice of the potential applicability of the Act when it made or failed to terminate these contracts.

onstrated that it is more appropriate to treat the Act's provisions as an implied term of the contracts voluntarily entered into by the utilities, rather than as an unexpected condition sufficient to nullify them.

2. Even if the court of appeals were correct in holding that the Commission's pole attachment rate order effects a taking of FPC's property, the Fifth Amendment requirement for "just compensation" is satisfied by the existing regulatory scheme.

The Pole Attachments Act, as implemented by the Commission, allows FPC to recover its fully allocated costs (47 U.S.C. 224(b)(1) and (d)(1); App., *infra*, 33a, 44a).[13] That recovery provides FPC with the "just compensation" to which it is constitutionally entitled. *Alabama Power Co.* v. *FCC*, 773 F.2d 362, 367 n.8 (D.C. Cir. 1985); cf. *Permian Basin Area Rate Cases*, 390 U.S. at 770 ("the just and reasonable standard of the Natural Gas Act coincides with the applicable constitutional standards"); *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 26 (recognizing that a range of reimbursement amounts would satisfy the Due Process Clause). Moreover, full judicial review of the Commission's pole attachment order is available in the court of appeals (47 U.S.C. 402(a); 28 U.S.C. 2342(1)), which has the power to set an order aside if it is found to be "contrary to constitutional right"—*e.g.*, inadequate to constitute just compensation (5 U.S.C. 706(2)(B)).

[13] The Commission regularly determines, as it did here, the "maximum just and reasonable rate" (App., *infra*, 44a) that the utility may charge by applying the statutory formula for determining the upper limit of a permissible rate, *i.e.*, the fully allocated costs (47 U.S.C. 224(d)(1)).

Although FPC simply sought to avail itself of this right to judicial review, the court of appeals found it unnecessary to consider the adequacy of the compensation, on the theory that once a taking is established, any scheme for determining just compensation that involves decision-making by a nonjudicial body is unconstitutional.

The court of appeals' theory finds no support in the constitutional language or in the decisions of this Court. The Fifth Amendment simply states that "private property [shall not] be taken for public use, without just compensation"; it contains no limitation on the means by which the amount of compensation due may be ascertained. And this Court has long recognized the propriety of permitting nonjudicial bodies to participate in the process. In *Bauman* v. *Ross*, 167 U.S. 548, 593 (1897), for example, the Court stated that the assessment of just compensation may, in the first instance, "be entrusted by Congress to Commissioners appointed by a court or by the executive." Cf. *United States* v. *Jones*, 109 U.S. 513, 519 (1883) (just compensation may be determined by "Commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate"). And only two Terms ago, this Court upheld against a just compensation claim a statutory scheme requiring the submission of disputes over compensation to binding arbitration before resort to judicial review. *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 27-31.[14]

[14] As the Court explained in *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 7-8, *Monsanto* held that the property owner "must complete arbitration and, in the event of a shortfall, exhaust its Tucker Act

The reliance of the court below on *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), is misplaced. That case makes clear what no one disputes, namely, that in carrying out its ultimate responsibility to decide whether compensation provided is constitutionally adequate, a court is not bound by any attempt by Congress to limit the scope of its inquiry, but must instead review the statutory limitations to determine whether they are consistent with constitutional requirements. But *Monongahela* does not suggest that Congress or an administrative body must be excluded altogether from the process of determining just compensation. It is sufficient that there be an opportunity for full judicial review of any congressional or administrative decisions with respect to compensation.[15] The judicial review provi-

remedies against the United States before it can be ascertained whether it has been deprived of just compensation."

[15] None of the other cases cited by the court below (App., *infra*, 16a-18a) supports its holding. In *Miller* v. *United States*, 620 F.2d 812, 837-838 (Ct. Cl. 1980), the court simply applied the principle enunciated in *Monongahela* that Congress cannot circumscribe the ultimate judicial determination of whether the compensation provided is constitutionally adequate by prescribing statutory limits on the amount to be paid. *United States* v. *15.3 Acres of Land*, 154 F. Supp. 770, 783 (M.D. Pa. 1957), merely summarizes the *Monongahela* holding in affirming a commission award of just compensation. *American-Hawaiian Steamship Co.* v. *United States*, 124 F. Supp. 378 (Ct. Cl. 1954), cert. denied, 350 U.S. 863 (1955), involved a claim for just compensation for the taking of a freighter requisitioned for military purposes, in which the court rejected, for the particular case before it, the rate established by the federal agency for such takings. The court simply noted that "[t]his court, while giving weight to the administrative determination, must nonetheless determine

sions of the Federal Communications Act (page 5, *supra*), assure that this opportunity exists in the case of the Commission's determinations under the Pole Attachments Act.[16] Indeed, this is merely a typical example of the familiar availability of judicial review of administrative rate regulation to assure against the imposition of confiscatory rate requirements. See, *e.g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. at 607.

In sum, it is clear that the scheme of regulation established by the Pole Attachments Act is constitutionally sound. It empowers an expert administrative agency to sift through the conflicting (often technical) facts and claims in a pole attachment complaint proceeding, and to make an assessment of just compensation; it also preserves for the judiciary the power to ensure that the statutory formula is not unconstitutionally confiscatory, and that the agency's calculation of just compensation properly applied that formula to the specific circumstances before it.

from the facts proven what it thinks is just compensation" (124 F. Supp. at 383).

Finally, contrary to the implication of the court of appeals (App., *infra*, 19a), this is not a situation of the kind warned against in *Isom* v. *Mississippi Cent. R.R.*, 36 Miss. 300, 315 (1858), in which the legislature has attempted to "constitute itself the judge in its own case" by condemning property and determining the amount it must pay for it. Instead, in the Pole Attachments Act Congress provided a neutral forum for disputes between private parties—the utility and the cable company with which it had contracted—and established the formula to be applied in resolving those disputes, without attempting to limit judicial review.

[16] There is accordingly no need in this case to rely on the availability of a remedy under the Tucker Act, 28 U.S.C. 1491. Cf. *Ruckelshaus* v. *Monsanto*, slip op. 28.

CONCLUSION

Probable jurisdiction should be noted and the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 84-3683, 84-3904

FLORIDA POWER CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT

Oct. 8, 1985

Petitions for Review of an Order of the Federal Communications Commission

Before RONEY and FAY, Circuit Judges, and DUMBAULD *, District Judge.

PER CURIAM:

This case involves an appeal by Florida Power Corporation (hereinafter "Florida Power") from an Order issued by the Federal Communications Commis-

* Honorable Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

sion (hereinafter "FCC" or "Commission") authorizing certain cable television companies to maintain cable equipment on Florida Power's utility poles at a rate significantly less than that specified in prior contracts between the parties. This Order was issued pursuant to the Pole Attachments Act, 47 U.S.C. § 224 (West Supp. 1985).

We conclude that the Order, which mandates a rental rate of less than one-third the agreed upon rates and which in reality precludes Florida Power from excluding the cable companies under any circumstances, amounts to a taking of private property for which just compensation is due under the Takings Clause of the Fifth Amendment. While the FCC's Order did impose a rate which was arguably "just" under the rule prescribed by Congress in the Act, that determination is insufficient for purposes of the Fifth Ameidment. Once there has been a taking, the determination of just compensation is a judicial, and not an administrative function. Because the Act does not properly allow for a judicial determination of just compensation, it is in our opinion, unconstitutional. Accordingly, the FCC's Order is hereby vacated.

GENERAL BACKGROUND

Since the advent of cable television in the 1950's, it has become a common practice for the telephone and electric utilities to permit cable television operators to set up their distribution systems by attaching cables and equipment to preexisting pole systems owned and maintained by the utilities. These leasing arrangements typically involve the rental of a portion of the unused space on the pole for an annual fee, as well as reimbursement to the utility for all costs as-

sociated with preparing the pole for the cable attachment.

The petitioner in this case, Florida Power, is no stranger to this industry practice. In 1963, Florida Power entered into such an agreement with Cox Cablevision Corporation (hereinafter "Cox"). Simiiar voluntary agreements were thereafter entered into by Florida Power with numerous other cable television companies, including Teleprompter Corporation and Teleprompter Southeast, Inc. (hereinafter "Teleprompter"), and Acton CATV, Inc. (hereinafter "Acton").

As the cable television industry began to boom in the 1960's, there was a general aura of discontent among the cable operators regarding their contracts with the telephone and electric power utilities. Undoubtedly the financial, economic and local franchise considerations made the use of preexisting pole networks the most feasible means of establishing a cable system. The cable operators complained, however, that the contracts proposed by the utilities frequently included arbitrarily determined rates as well as standard terms and conditions which were offered on a take-it-or-leave-it basis. Arguably the utilities enjoyed a superior bargaining position over the cable operators by virtue of their monopoly on the ownership and control of these poles.

In the late 1960's, cable companies began to complain that the utilities were exploiting their position by demanding unreasonably high attachment rates. The FCC investigated the allegations but concluded that it lacked jurisdiction because pole attachments did not constitute "communications by wire or radio" within the meaning of the Communications Act, 47 U.S.C. § 151 (1962). *California Water and Tele-*

phone Co., 64 F.C.C.2d 753, 758 (1977). *See generally* S.Rep. No. 580, 95th Cong., 2d Sess., 12-13 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 109, 120-21.

In the mid 1970's, at the urging of the cable television industry, Congress began to look into these alleged abuses of the utilities' monopoly power. Legislation was introduced and extensive hearings were held to address the issue. Finally, in 1978, Congress passed the Pole Attachments Act, 47 U.S.C. § 224. The Act authorized the FCC, subject to preemption by state regulation, to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). The Act then sets forth a rule or formula by which the FCC is to determine the "just and reasonable" rate for each particular situation. *See* 47 U.S.C. § 224(d)(1).

In addition, the Act gave the FCC authority to "adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b)(1). In compliance thereof, the FCC issued a series of orders promulgating rules for administering the Act. *See First Report and Order in CC Docket 78-144*, 68 F.C.C.2d 1585 (1978); *Memorandum Opinion and Second Report and Order in CC Docket 78-144*, 72 F.C.C.2d 59 (1979), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981); *Memorandum Opinion and Order in CC Docket 78-144*, 77 F.C.C.2d 187 (1980). In 1981, the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's basic rulemaking decisions, *Monongahela Power*, 655 F.2d 1254, and in 1982, Congress extended the FCC's methodology by indefinitely repealing a "sunset" provision initially contained in the Act. *See* 47 U.S.C. § 234(e) (1978);[1] Conference Report on H.R. 3239, Communications Amendment Act of 1982, 128 Cong. Rec. H6537 col. 3 (daily ed. August 19, 1982). Since the passage of the Act in 1978, the FCC has resolved more than 100 pole attachment cases brought under § 224.

COURSE OF PROCEEDINGS

Availing themselves of the relief provided in the Pole Attachments Act, Teleprompter and Acton complained to the FCC that they were being overcharged by Florida Power under their existing pole attachment agreements. Teleprompter filed its complaint with the Common Carrier Bureau of the FCC on November 18, 1980. Prior to this time, Florida Power had been charging Teleprompter an annual rental rate per pole of $6.24. This rate was agreed to by the parties in a contract dated July 1, 1977. That contract further provided for rates of $6.51 for the year 1981, and $6.79 for the year 1982. Teleprompter's complaint requested the FCC to order a maximum annual rate of $2.23 per pole, to insert that rate into the contract between the parties, and to require Florida Power to refund to Teleprompter all monies paid in excess of that rate, with interest, from the date of the filing of the complaint.[2]

[1] The "sunset" provision, 47 U.S.C. § 224(e), initially provided that upon the expiration of the 5-year period that began on February 21, 1978, the provisions of subsection (d) would cease to have any effect. This provision was removed by a 1983 Amendment, Pub.L. 97-259.

[2] Teleprompter's initial complaint requested a maximum rate of $1.38 per pole. After reviewing Florida Power's response, however, Teleprompter modified its complaint to

Acton filed its complaint against Florida Power on February 20, 1981. At the time the complaint was filed, Acton was paying Florida Power an annual rental rate of $7.15 per pole pursuant to two contracts between the parties entered into on June 16, 1980. Acton's complaint, which essentially modelled Teleprompter's, requested the FCC to order a maximum annual rate of no more than $2.21 per pole, to insert that rate into the contract between the parties, and to require Florida Power to refund, with interest, all monies paid in excess of that rate after the date the complaint was filed.[3]

Florida Power's response to each of these complaints was essentially the same. The utility contended that the requested relief, if granted, would effect a taking of private property without just compensation in violation of the Fifth Amendment. Florida Power also objected to the complaints on jurisdictional grounds, arguing that the requested relief exceeded the FCC's authority under the Act. Moreover, in regard to Teleprompter's complaint, the utility argued that the relief requested would retroactively nullify a contract predating the effective date of the Act, thus violating the Due Process Clause of the Fifth Amendment. This argument, however, was not made in response to Acton's complaint because the Acton contract was entered into after the Act's effective date.

show a requested rate of $2.23. This revision was obviously prompted by information contained in Florida Power's response about which Teleprompter had no previous knowledge.

[3] Acton's complaint initially requested a maximum rate of $2.23 per pole. After reviewing Florida Power's response, however, Acton also modified its complaint to show a requested maximum rate of $2.21 per pole.

On July 16, 1981, the FCC's Common Carrier Bureau issued a *Memorandum Opinion and Order* (hereinafter "Teleprompter—Acton Order") responding to the Teleprompter and Acton complaints. The FCC found in favor of the cable companies in both instances and ordered an annual per pole rate of $1.79 for each; $.44 lower than the rate requested by Teleprompter and $.42 lower than the rate requested by Acton.

On August 11, 1981, Florida Power filed an application for review by the FCC pursuant to 47 C.F.R. § 1.115 (1984). While this application was pending, Cox filed its complaint against Florida Power with the FCC. Cox's initial agreement with Florida Power dated back to 1963 and provided for an annual rental rate of $5.50 per pole. In 1978, Florida Power had proposed a new rate of $6.86. The parties were unable to reach an agreement on this issue so Florida Power invoked a contractual provision authorizing a higher rate under such circumstances. Cox, however, continued to pay at the previous rate of $5.50 per pole. Florida Power responded by suspending Cox's rights under the contract. Nonetheless, the initial contract was still in effect when Cox filed its complaint against Florida Power.

On March 8, 1982, the Common Carrier Bureau issued a *Memorandum Opinion and Order* (hereinafter "Cox Order") granting Cox's request for imposition of a rate of $1.79 per pole. The substance of the Cox Order was virtually identical to the Teleprompter-Acton Order. Due to the contract dispute between the parties, however, this order did not grant a refund to Cox. Florida Power subsequently filed an application for review of the Cox Order with the FCC.

On September 28, 1984, more than three years after Florida Power filed its application for review of the Teleprompter-Acton Order, and more than two years after its application for review of the Cox Order was filed, the FCC, in a single order (hereinafter "Order"), denied both applications. The FCC's Order rejected Florida Power's constitutional arguments under the Takings and Due Process Clauses and in general language upheld all of the Common Carrier Bureau's decisions bearing on rate calculation.

Florida Power petitioned this Court for review of the FCC's Order on October 5, 1984. Intervenors on behalf of Florida Power included Tampa Electric Company, Mississippi Power and Light Company and Alabama Power Company. The FCC, as respondent, received support on appeal from a number of intervening cable television companies, including Acton, Cox, and Group W Cable, Inc., the successor in interest to Teleprompter.

THE APPLICABLE CASE LAW

Florida Power argues that the FCC's Order mandating an annual per pole rate of $1.79 in the case of Teleprompter, Acton and Cox amounted to a taking of property without just compensation in contravention of the Fifth Amendment.

In support of its argument, Florida Power relies primarily on the United States Supreme Court decision of *Loretto v. Teleprompter-Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). *Loretto* involved a New York statute which provides that a landlord must permit a cable television company to install cable components upon his property in return for an amount determined to be reasonable by the State Commission. Pursuant to that statute, the Commission had ruled that a one-

time $1 payment was reasonable. The appellant, Jean Loretto, had purchased a five story apartment building in New York City and afterwards discovered cable equipment already in place along the building's exterior walls. Ms. Loretto thereafter brought a class action suit for damages and injunctive relief, alleging *inter alia*, that the installation constituted a taking without just compensation. The New York courts rejected Loretto's argument and denied the requested relief.

On appeal, the United States Supreme Court held that the New York statute requiring a landlord to permit the installation of cable television facilities upon her property at a government-fixed rate worked a taking of that property requiring just compensation under the Fifth Amendment. In reaching this conclusion, the Supreme Court deemed applicable the traditional rule that "a permanent physical occupation of another's property is a taking." *Id.* at 435, 102 S.Ct. at 3175. After a thorough discussion of the general principles governing the Takings Clause, the Court concluded:

> Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.

Id. at 438, 102 S.Ct. at 3177. The Court thereafter remanded for state court consideration the issue of the amount of compensation due.

The FCC contends that *Loretto* is not even remotely applicable to the instant case. They base this conten-

tion on what they perceive to be significant differences between the circumstances in *Loretto* and those in the case at hand. According to the FCC, the Supreme Court's conclusion that there was a taking in *Loretto* is based upon two factors: (1) there was an uninvited access to the property of the landlord by the cable company, and (2) the cable company's components constituted a permanent physical occupation of the landlord's property. These factors, the FCC argues, are not present in the instant case.

In regard to this argument, we have no disagreement with the FCC's interpretation of the factors underlying *Loretto*. What troubles this court, however, is the attempt to distinguish *Loretto* by arguing that the factors underlying that decision are nonexistent in the case of Florida Power.

The FCC points out that *Loretto* and the cases cited therein all involved what the FCC has termed an *uninvited access* to property. That factor, the FCC argues, is not present in the Florida Power case because Florida Power knowingly and voluntarily contracted with the cable companies for the installation of the cable network. Therefore, the FCC contends, the access to the poles was *invited*, not uninvited, and *Loretto* and its predecessors do not apply.

Assuming for the moment that Florida Power's actions can be construed as an invitation to access its poles, it is nonetheless clear that that invitation was made subject to and based upon certain conditions, namely the agreed upon annual per pole rate. To the extent the cable companies complied with the terms of their agreements, their occupation might well be construed as invited. But by insisting on a significantly lower rate, the cable companies have themselves transformed their status from that of an in-

vitee, to use their own terms, to that of an unwanted guest. While they may have been invited at the outset, they certainly weren't invited at the rate imposed by the FCC. In our opinion, the cable companies' occupation of Florida Power's poles at the rate specified by the FCC is anything but invited.

The FCC, however, carries the argument a step further. It claims that although Florida Power would naturally prefer the higher rates, it still welcomes the cable companies' presence even at the new lower rates. According to the FCC, this is evident from the fact that Florida Power has taken no steps to exclude the cable companies. Therefore, the FCC argues, the cable companies' presence can still be construed as invited and *Loretto* does not apply.

In our opinion, this argument simply ignores reality. The hard reality of the matter is that if Florida Power desires to exclude the cable companies, for whatever reason, they are powerless to do so. We say this because in previous cases where utilities have ordered cable companies to disconnect, the FCC has routinely intervened by issuing temporary stays which prevent the exclusion of the cable companies. *See Whitney Cablevision v. Southern Indiana Gas & Electric Co.*, Mimeo 841 (Nov. 16, 1984); *Tele-Communications, Inc. v. South Carolina Electric & Gas Co.*, Mimeo 5957 (Aug. 16, 1983). Thus we can predict with some confidence what the FCC's response would be should Florida Power attempt to do the same.[4] The fact that Florida Power has not under-

[4] The FCC contends that *Whitney*, Mimeo 841, and *TeleCommunications*, Mimeo 5957, should not be relied upon as indicators of how the FCC would respond should Florida Power try to exclude the cable companies. According to the FCC, the issuance of the temporary stays in those two cases was neces-

taken what obviously would be a futile attempt at excluding the cable companies is by no means an indication that Florida Power invites or even accepts the cable companies' presence at the FCC-imposed rates.

Consequently, we conclude that *Loretto* is not distinguishable from the instant case on the basis of uninvited access. We therefore turn to the FCC's second argument as to why *Loretto* does not apply.

The FCC contends that *Loretto* is not applicable to the Florida Power situation because Florida Power is not faced with a *permanent* physical occupation by the cable companies. It is not permanent, argues the FCC, because the physical occupation is pursuant to a contract for a term of years and can thereafter be terminated. For the reasons which follow, we reject this argument.

First of all, the FCC's argument presupposes that when the cable companies' contracts expire, Florida Power will be free to refuse to renew those agreements. As we intimated earlier, however, we have no doubt that Florida Power would face considerable difficulty in trying to exclude the cable companies. This holds true regardless of whether the disconnect order is issued prior to or after the expiration of the contract period. In fact the FCC has made it quite clear that it intends to require continued provision of space at FCC-ordered rates. In anticipation of such events, the FCC has stated: "Even where

sary to prevent "retaliatory" action by the utilities involved. It is difficult for us to imagine, however, how Florida Power, or any utility for that matter, could issue a disconnect order under such circumstances and have it escape being deemed retaliatory by the FCC. Consequently, the FCC's argument on this matter is unpersuasive.

there is currently no [cable television] attachment or agreement thereof, the Commission has jurisdiction if: (1) there is communication space designated on the poles and (2) the utility has discontinued [cable television] attachment in order to avoid such Commission jurisdiction." *First Report, supra,* 68 F.C.C.2d at 1589. In terms of permanency then, the fact that this physical occupation is pursuant to a contract for a term of years is by no means proof that the physical occupation will cease at any particular time.

In any event, this distinction is overstated and in our opinion irrelevant. It is apparent from *Loretto* that when the Court speaks in terms of a permanent physical occupation, it does not necessarily mean that the occupation is one which will last forever. In fact the Court noted that the property owner in *Loretto* could force the cable company to disconnect at any time by simply occupying the building herself, or by converting it to commercial property. 458 U.S. at 439 and n. 17, 102 S.Ct. at 3178 and n. 17. Florida Power on the other hand, must at the very least wait until the contracts expire, and even then it is doubtful whether Florida Power would be able to exclude the cable companies. Consequently, the extent of the occupation in the case of Florida Power not only satisfies *Loretto's* permanency requirement, but significantly exceeds it.

The crux of the matter then is that the FCC's emphasis on the extent of the occupation is misplaced. *Loretto* indicates that in resolving the taking issue, the focus should be placed not on the extent of the occupation, but rather on the nature of the physical attachment itself:

> [W]hether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance.

Id. at 437-38, 102 S.Ct. at 3177 (emphasis in original). In regard to the physical attachment then, *Loretto* and the instant case are virtually indistinguishable; they both involve the placement of plates, boxes, wires, bolts and screws upon the property of a reluctant owner. Moreover, to the extent that a permanent physical occupation includes some element of permanency, we conclude that the instant case satisfies that element as set forth in *Loretto*.

For the aforementioned reasons, we conclude that the instant case is not distinguishable from *Loretto* on the basis of either uninvited access or permanency of the occupation. *Loretto* therefore controls, and based on that decision, we hold that the FCC's Order effected a taking of Florida Power's property.

THE JUST COMPENSATION ISSUE

Having concluded that the FCC's Order worked a taking of Florida Power's property, the next issue which naturally arises concerns the amount of compensation due. Florida Power argues that in mandating a rental rate of less than one-third the rates

originally agreed upon, the FCC has deprived it of just compensation in violation of the Fifth Amendment. While this may or may not be true, it is our opinion that an even more fundamental question must first be addressed: Does the FCC, an administrative agency, have the power to determine what is or is not just compensation for purposes of the Fifth Amendment Takings Clause? In our opinion, it does not.

It appears to this court that the determination of what constitutes just compensation is a decision which has been jealously guarded as being solely within the parameters of the judicial function. For example, in the early case of *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893), the Supreme Court had the opportunity to address this issue. In *Monongahela*, Congress had enacted legislation which authorized the Secretary of War to negotiate for, or in the alternative to take, a lock and dam located on the Monongahela River, and to pay the owner of that lock and dam, the Monongahela Company, a purchase price not in excess of $161,733.13. As regards the just compensation issue, the Court stated:

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say

> what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Id. at 327, 13 S.Ct. at 626. The Court then went on to quote with approval the following language from the Mississippi Supreme Court's decision in *Isom v. Mississippi Central R.R.*, 36 Miss. 300 (1858):

> The rights of the legislature . . . to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefore, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice cannot for a moment be admitted or tolerated under our Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.

Monongahela, 148 U.S. at 327-28, 13 S.Ct. at 627 (emphasis in original) (quoting *Isom*, 36 Miss. at 315).

More recently, several United States Court of Claims decisions have relied on *Monongahela* in striking down legislatively imposed standards for just compensation. For example, in *Miller v. United States*, 620 F.2d 812, 223 Ct.Cl. 352 (1980), the United States effected a taking of some 2,646 acres of tim-

berland for inclusion in the Redwood National Forest. While the parties at trial stipulated to the fair market value of the timberland, a question remained concerning the interest rate which should apply to the delay in payment of just compensation. Prior to this taking, Congress had enacted legislation which mandated that a 6% interest rate was an appropriate rate of interest to cover such delays. The Court of Claims, however, relying on *Monongahela*, held that the 6% rate was not binding on the court. *Id.*, 620 F.2d at 837. The court stated that "the determination of just compensation under the fifth amendment is exclusively a judicial function," and that "[i]t does not rest with Congress to say what compensation shall be paid, or even what shall be the rule of compensation." *Id. See also United States v. 15.3 Acres of Land*, 154 F.Supp. 770, 783 (M.D.Pa.1957) (ascertainment of just compensation is a judicial function and no power exists in any other department of government to declare what the compensation shall be or to prescribe any binding rule in that regard).

In another Court of Claims decision, *American-Hawaiian Steamship Co. v. United States*, 124 F. Supp. 378, 129 Ct.Cl. 365 (1954), *cert. denied*, 350 U.S. 863, 76 S.Ct. 103, 100 L.Ed. 766 (1955), the United States War Shipping Administration (hereinafter "WSA") effected a taking of a privately owned steam freighter for military use during World War II. The WSA derived its authority for such takings from the Merchant Marine Act of 1936, 46 U.S.C.A. 1242. Pursuant to this Act, the WSA issued General Order No. 37, which fixed a basic bareboat charter rate of $1.25 per deadweight ton per month for such vessels. As in *Miller*, the Court of Claims held that it was not bound by the WSA imposed rate,

and that $2.50 per deadweight ton per month was "just" to both parties. *American-Hawaiian*, 124 F.Supp. at 384. In reaching this conclusion, the court stated:

> The ascertainment of just compensation is not an administrative but a judicial function; no power exists in any administrative agency of the Government to declare what that compensation should be or to prescribe any binding rule in that regard.

Id. at 382-83 (citing *Monongahela*, 148 U.S. at 327, 13 S.Ct. at 626.)[5]

The Pole Attachments Act clearly runs afoul of the principles set forth in the Fifth Amendment and in the aforementioned cases. Section (d)(1) of the Act provides as follows:

> (d) Determination of just and reasonable rates; definition
>
> (1) For purposes of subsection (b) of this section, *a rate is just and reasonable* if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

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[5] In holding as it did, the Court of Claims emphasized that the constitutional requirement that the government must pay just compensation for what it takes for public use is one which war does not suspend, alter or modify. *American-Hawaiian*, 124 F.Supp. at 382.

47 U.S.C. § 224(d)(1) (emphasis added). By prescribing a "binding rule" in regard to the ascertainment of just compensation, Congress has usurped what has long been held an exclusive judicial function. *See Monongahela*, 148 U.S. at 327, 13 S.Ct. at 626; *Miller*, 620 F.2d at 837; *U.S. v. 15.3 Acres*, 154 F.Supp. at 783; *American-Hawaiian*, 124 F.Supp. 382-83. As the Supreme Court held in *Monongahela*, such interference "with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution." *Monongahela*, 148 U.S. at 327-28, 13 S.Ct. at 627. Because the Act does not allow for a judicial determination of what constitutes just compensation, it is in this court's opinion, unconstitutional.

CONCLUSION

The FCC's Order authorizing cable operators to occupy space on Florida Power's poles effected a taking of property for which just compensation is due. The determination of just compensation, however, was constitutionally inadequate in this case because it was made by an administrative agency at the behest of Congress rather than by judicial inquiry as required by law. The Pole Attachments Act, pursuant to which this Order was issued, does not properly allow for a judicial determination of just compensation, but instead prescribes a rule by which the FCC is to determine the maximum allowable rates. For the legislature to take the property of a person and then to constitute itself the judge in its own case, to determine what is "just compensation," offends our most fundamental principles of natural justice and constitutional law. The determination of just com-

pensation is clearly a judicial function. To the extent that this Act deviates from this well-established principle, we hold it unconstitutional.[6]

This holding, of course, relates to the taking by the federal government, which regulates cable television. We express no opinion whatsoever as to any issues that might be raised if a state agency charged with the responsibility of regulating the power company as a public utility sought to exercise some control or rate-making procedures concerning attachments to the company's utility poles.

The FCC's Order is, therefore, VACATED.

[6] Florida Power also raises the issue of whether the Order, insofar as it abrogated contracts in existence prior to the effective date of the Pole Attachments Act, deprived Florida Power of property without due process of law contrary to the provisions of the Fifth Amendment. In light of our disposition of appellant's taking claim, we see no need to address this contention.

We also note that had we not found that the FCC's Order constituted a taking, we would have been compelled to address the alternative argument of Florida Power, that being whether the rate calculated by the FCC was arbitrary and capricious. This of course, would have entailed a different standard of review altogether. In such cases, the focus is, as Florida Power points out, whether the Order is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A) (1977).

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. PA-81-0008

In the Matter of

TELEPROMPTER CORPORATION and
TELEPROMPTER SOUTHEAST, INC., COMPLAINANTS

v.

FLORIDA POWER CORPORATION, RESPONDENT

File No. PA-81-0023

In the Matter of

ACTON CATV, INC., d/b/a
BROOKVILLE PROPERTIES VENTURE
and PASCO ASSOCIATES VENTURE, COMPLAINANTS

v.

FLORIDA POWER CORPORATION, RESPONDENT

File No. PA-82-0005

In the Matter of

COX CABLEVISION CORP. d/b/a
HIGHLAND CABLE TV, COMPLAINANT

v.

FLORIDA POWER CORPORATION, RESPONDENT

MEMORANDUM OPINION AND ORDER

Adopted September 10, 1984;

Released September 28, 1984

By the Commission:

1. The Commission has before it two applications by Florida Power Corporation ("FPC") for review of two Common Carrier Bureau Orders, involving three individual complaints, which found FPC's pole attachment rates unjust and unreasonable under Section 224 of the Communications Act, 47 U.S.C. § 224. *Teleprompter Corp. v. Florida Power Corp.*, Mimeo No. 001980 (released July 16, 1981) (*Teleprompter*); *Cox Cablevision Corp. v. Florida Power Corp.*, Mimeo No. 2639 (released March 8, 1982) (*Cox*) (Collectively, *Orders*).[1] FPC allges error in certain calculations made by the Bureau in its determination of the two rates and questions the validity of the Commission's 13.5-foot usable space figure and its use of a 15-percent deduction in calculating the net cost of a bare pole. The utility claims that these alleged errors resulted in rates below what is just and reasonable and its seeks modification of the *Orders* accordingly. Further, FPC maintains that the holdings in *Teleprompter* and *Cox* violate the fifth amendment of the United States Constitution and exceed the authority granted to the Commission under the Pole Attachment Act, 47 U.S.C. § 224, because the orders abrogate contracts which predate enactment of the Act and grant relief which, in effect, constitutes a taking without just compensation.[2] The CATV operators support the Bureau's *Orders* and urge denial of the applications.

[1] The two applications for review are substantially identical and Teleprompter and Cox have filed similar responses. As such, we can appropriately consolidate the two applications and make uniform findings.

2. *Calculations of the Maximum Rate.* We have fully reviewed FPC's contentions regarding the Bureau's computations of the maximum just and reasonable rates and find no reason to disturb the rationale or result of the Bureau's determinations. FPC has not provided any arguments which would form a basis for reaching any different result, but rather has repeated arguments which have been addressed at length and disposed of in these and other orders. *See e.g. Teleprompter Corporation and Teleprompter Southeast, Inc. v. Florida Power and Light*, FCC 83-562 (released December 5, 1983); *Petition to Adopt Rules Concerning Usable Space on Utility Poles* (RM 4558), FCC 84-325 (released July 25, 1984).

3. *Jurisdictional and Constitutional Arguments* The utility's argument that the abrogation of an existing contract exceeds the Commission's authority was properly considered and rejected in the Order below, and we find no reason to revise the Bureau's determination. *See also Monongahela Power Co. v. Federal Communications Commission*, 655 F.2d 1254 (D.C. Cir., 1981) which upheld the authority of the Commission to exercise jurisdiction over pole attachments entered into prior to the effective date of Section 224 of the Act. Turning to the constitutional issues, we are not persuaded by FPC's arguments.

[2] FPC subsequently filed a "Motion for Leave to File" and a "Supplemental Submission" which addressed a recent Supreme Court decision, discussed in paragraph 4, below. We grant the motion and accept the supplement.

FPC contends that the Pole Attachment Act violates the due process clause of the fifth amendment because it impairs the obligation of contracts existing prior to the enactment of the Act. In essence, it argues that the Due Process Clause should be construed to incorporate a contract clause comparable to that found in article I, section 10, of the United States Constitution and that Contract Clause scrutiny should therefore be applied in analyzing the constitutionality of the Pole Attachment Act. We need not actually make this determination, however, since the Contract Clause by its terms applies only to state, not federal, enactments.[3] Moreover, the Supreme Court has never held that the principles embodied in the fifth amendment Due Process Clause are coextensive with prohibitions existing against state impairment of pre-existing contracts. *See, Pension Benefit Guaranty Corp. v. R. A. Gray & Co.* —— U.S. ——, 104 S. Ct. ——, 80 L. Ed. 2d —— (52 U.S.L.W. 4810, June 18, 1984). In *Gray*, the court considered whether applying liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 to employers withdrawing from pension plans during a five month period prior to the enactment of the statute violated the Due Process Clause of the fifth amendment. In determining that the Act did not violate the fifth amendment, the Court set aside suggestions that it apply constitutional principles developed under the Contract Clause and stated that ". . . to the extent that recent decisions of the court have addressed the issue, we have contrasted the limitations imposed on

[3] Article I, Section 10, Clause 1 of the United States Constitution provides that "[N]o state shall . . . pass any bill of attainder, ex post facto law or law impairing the obligation of contract. . . .".

states by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clause." *Id.* at 4814. Moreover, the court added that ". . . although [it had] noted that retrospective civil legislation may offend due process if it is particularly 'harsh and oppressive' . . . . that standard does not differ from the prohibition against arbitrary and irrational legislation that [it] clearly enunciated in *Turner Elkhorn.*" *Id.* In that case (*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)), the Court, considering a constitutional challenge to the retroactive effects of a federal statute, noted:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish the legislature has acted in an arbitrary and irrational way. See, *e.g., Ferguson v. Skrupa*, 372 U. S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488 (1955). 428 U.S., at 15.

In this regard we note that FPC fails to point to any evidence whatever that Congress acted in an "arbitrary and irrational way" in enacting the Pole Attachment Act. Nor has the petitioner offered evidence to overcome the determination in *Monongahela Power* that the Commission properly interpreted legislative intent in exercising its authority under the Act to abrogate existing contracts. 655 F.2d at 1256.

4. Notwithstanding the above, however, application of Contract Clause standards to the Pole Attachment Act plainly reveals that the Act violates neither the

Contract Clause nor the less stringent standards of the Due Process Clause.[4] Unlike the statute at issue in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), cited by the utility in support of its contention that the Bureau's action is contrary to the fifth amendment, the Act does not effectuate "substantial" and "severe" impairments of a contractual relationship. 438 U.S. at 244-46.[5] Thus, applying standards developed in *Spannaus*, we note that the Pole Attachment Act operates prospectively and contract terms are altered only to the extent of services supplied subsequent to its enactment. Indeed, the Commission adjusts only those charges accruing after the filing of a complaint. *Spannaus*, on the other

[4] *See, Peick v. Pension Benefit Guaranty Corp.*, 724 F. 2d 1247 (7th Cir. 1983) (indicating that while by no means coextensive the mode of analysis under the Due Process Clause closely parallels Contract Clause principles); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979) (indicating that if legislation survived the scrutiny of the Contract Clause, it would survive the less searching standards imposed on legislation by the Due Process Clause).

[5] The mere fact that a preexisting contract has been abrogated is insufficient of itself to constitute a violation of the Contract Clause. *See e.g., Jones v. Lynn*, 477 F.2d 885 (1st Cir. 1973); *Minnesota Gas Co. v. Public Service Commission*, 523 F. 2d 581 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976); *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372 (1919). Rather, the issue is whether the statute unreasonably impairs contractual obligations. *Spannaus* at 244-245. In making this determination, the Supreme Court has enumerated several factors that are to be considered: (i) whether the statute at issue effects a substantial modification of contracts, (ii) whether the modification has a retroactive effect, (iii) whether the modification could have been anticipated, and (iv) whether the modification occurred in an area where the element of reliance is vital. *Id.* at 246.

hand, found unconstitutional a statute which mandated that a company undertake, retroactively, heavy financial burdens in addition to those it had contracted to assume. *Id.* at 246-247. Further, FPC cannot reasonably argue that modification could not have been anticipated. It is well established that contracts made in areas of governmental regulation are subject to modification by subsequent legislation. *See, Veix v. Sixth Ward Bldg. & Loan Ass'n.*, 310 U.S. 32 (1940). Indeed, the Supreme Court has held that "[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *FHA v. Darlington, Inc.*, 358 U.S. 84, 91 (1958). The ability of Congress to react to changing conditions and to legislate in the public interest cannot be restricted by private agreements. *Producers Transportation Co. v. Railroad Commission of California*, 251 U. S. 228, 232 (1920). "Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution." *FHA v. Darlington, Inc.*, 358 U. S. at 91. Nor has FPC shown that modification of contracts under the Pole Attachment Act occurs in areas upon which it relies heavily or in which its interests are considered vital since the revenue associated with such contracts is *de minimis* to the utility and its ability to provide electric service to its customers is not impaired in any way by the contractual terms. In light of the above, the Pole Attachment Act cannot be said to be either "arbitrary or irrational" or to operate in a manner which substantially and severely impairs contractual relationships.

5. Further, FPC maintains that, under the doctrine of *Loretto v. Teleprompter Manhattan CATV*,

458 U.S. 419 (1982), any Commission-ordered abrogation of its bargained-for pole attachment contracts would be a forced taking of property without just compensation and due process of law in violation of the fifth amendment of the United States Constitution. It contends that the bargained-for rate contained in the contracts is the least amount that can be considered reasonable compensation for such a taking. However, a Commission-ordered abrogation of a contractual pole attachment rate is inapposite to a taking under the *Loretto* doctrine, which addressed a physical occupation without any compensation. Congress, in enacting Section 224, recognized the unequal bargaining position of the parties in these situations and empowered the Commission to act as arbiter in determining what is just, reasonable, and fair compensation and, if necessary, cancel unreasonable contract provisions. S. Rep. No. 95-850, 95th Cong. 1st Sess. 14 (1977). Moreover, the Commission's complaint procedures provide all parties an opportunity to be heard. Therefore, FPC is not being deprived of property without just compensation or without due process of law.

6. Accordingly, IT IS ORDERED, That the applications for review filed by Florida Power Corp. ARE DENIED.

7. IT IS FURTHER ORDERED, That the Motion for Leave to File IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. PA-82-0005

In the Matter of

COX CABLEVISION CORP. d/b/a
HIGHLANDS CABLE TV, COMPLAINANT

v.

FLORIDA POWER CORPORATION, RESPONDENT

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1982; Released: March 8, 1982

By the Chief, Common Carrier Bureau:

1. Before the Bureau, pursuant to delegated authority, is a complaint filed under Section 224 of the Communications Act, 47 U.S.C. § 224, by Cox Cablevision Corp. d/b/a Highlands Cable TV (Cox) alleging that Florida Power Corporation (FPC) has imposed unjust and unreasonable rates for cable television pole attachments. That section empowers the Commission to adjudicate attachment rate disputes between cable television system operators and telephone and electric utilities. After consideration of the pleadings, we conclude that FPC in fact charges

unjust and unreasonably high rates, but that a refund is not warranted at this time.

Background and Contentions of the Parties

2. Cox owns and operates cable television systems serving the communities of Avon Park, Sebring and unincorporated areas of Highlands and Marion County, Florida. Pursuant to a contract with FPC, Cox has attached distribution facilities to the utility's poles.

3. Using information produced initially by FPC or developed by the Commission in resolving other complaints against FPC, and applying the formula established by Section 1.1409(c) of the Commission's Rules, 47 C.F.R. § 1.1409(c), Cox calculates that the maximum just and reasonable rate is $1.79 per attachment. It therefore urges us to substitute this lower rate for the $5.50 rate that it is presently paying, and further, to order appropriate refunds.[1]

4. FPC, for its part, challenges the complaint on jurisdictional and procedural grounds and denies the validity of the $1.79 per pole rate calculated by Cox.[2]

[1] In 1978, FPC presented Cox with a proposed rate increase from $5.50 to $6.86. Desipte lengthy negotiation over the proposed new rate, the parties failed to reach an agreement. On March 20, 1979, FPC suspended Cox's rights insofar as additional pole attachments are concerned. Moreover, from the date of suspension through the most recent semi-annual invoicing, FPC has charged Cox in accordance with §8.1 of their operating contract, a provision governing rates in the event of a dispute over an increase. Under this provision, FPC began charging Cox $11.47 per pole attachment. Cox has, however, rejected this rate and continues to pay FPC $5.50 per pole.

[2] FPC preliminarily argues that the Commission lacks jurisdiction to alter pole attachment contracts entered into voluntarily prior to the effective date of Section 224. The Commission, however, has previously determined that it does have this authority and we need not explain the rationale once again. *See First Report and Order in CC Docket 78-144*, 68 FCC 2d 1585, 1591 (1978), *aff'd on recon., Second Report and Order in CC Docket No. 78-144*, 72 FCC 2d 59, 67 (1979) (*"Second Report"*), *aff'd sub. nom. Monongahela Power Company* v. *Federal Communications Commission*, No. 80-1390 (D.C. Cir., May 15, 1981) (*"Monongahela Power"*).

It argues not only that the $5.50 rate is reasonable but that a rate of $16.94 per pole would be fair and just. Moreover, respondent claims that as a result of a contractual violation, Cox now owes FPC $40,783.73, excluding interest, and that this should be considered in any rate adjustment or refund that might be ordered.[3]

5. Section 1.1409(c) of the Commission's Rules, 47 C.F.R. § 1.1409(c), provides that the maximum "just and reasonable" rate for pole attachments is to equal the percentage of the total usable space occupied by the pole attachment times the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. This rule, expressed as a formula, is as follows:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \text{Operating Expenses} + \text{Capital Costs of Poles}$$

In the instant case, the parties dispute centers on all of these elements.

6. *Total Usable Space and Space Occupied by CATV.* Complainant's arguments regarding usable

[3] The $40,783.73 alleged debt figure is the difference, calculated over a two-year period, between the $5.50 rate that Cox is presently paying and the $11.49 rate that FPC is currently charging per pole attachment.

pole space and space occupied by CATV are substantially identical to those in *Cable Information Services, Inc. v. Appalachian Power Company*, 81 FCC 2d 383 (1980). (*"C.I.S."*). Cox has used 13.5 feet as the average usable space figure and twelve inches as the space occupied by CATV. These figures comport with the Commission's rules and prior decisions. FPC, on the other hand, argues that the Commission has misconstrued Congressional intent and urges the Commission to revise its usable space policies so as to avoid rates which are neither just nor reasonable. Indeed, it suggests that the usable space factor ought not be considered. Rather, FPC contends that a fair and reasonable rate is one that reflects the cost of attachments to a CATV system owning its own poles. FPC's contention notwithstanding, we have determined previously that for the purposes of the rate formula, in the absence a substantiated pole height study, we will use 13.5 feet as the average usable space figure, and the space occupied by CATV is one foot.[4] There is no need to repeat the Commission's rationale for using these figures in the rate formula.

7. *Operating Expenses and Capital Costs of Poles.* The final formula element to be determined is operating expenses and capital costs of poles. Although operating expenses and capital costs of poles (also known as "carrying charges") can be expressed directly as dollar amounts, these costs may also be expressed as a percentage of net pole investment. Section 1.404(g)(9), 47 C.F.R. § 1.1404(g)(9). Thus, the operating expenses and capital costs of poles normally are determined from the net cost of a bare pole and the carrying charges attributable to the cost of owning a pole.

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[4] *Second Report, Monongahela Power, supra* n. 2.

8. *Net Cost of a Bare Pole, Carrying Charges, and Maximum Rate.* The figures submitted by the parties to justify their calculations of the net cost of a bare pole, the carrying charges, and the maximum just and reasonable rate, and the arguments advanced to support their figures, are identical to those contained in the pleadings in another complaint against FPC. See *Teleprompter Corp. v. Florida Power Corp.*, Mimeo No. 001980 (released July 16, 1981) (hereinafter *Teleprompter*). In that case the Commission determined that based on 1980 year-end data, the maximum just and reasonable rate FPC may charge per pole attachment per annum is $1.79.[5] The parties have submitted no new data which would require reexamination of that finding. The conclusion is inescapable, therefore, that FPC's rate of $5.50 and $11.47, are unjust and unreasonable within the meaning of Section 224 of the Communications Act, 47 U.S.C. § 224, and the underlying rules.[6]

9. After making a determination, based upon a complaint and responsive pleadings, that an existing pole attachment rate is unjust and unreasonable, it is our responsibility to fashion a suitable remedy.

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[5] $$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \begin{array}{c}\text{Cost of a}\\ \text{Bare Pole}\end{array} \times \begin{array}{c}\text{Carrying}\\ \text{Charges}\end{array}$$

$$\text{Maximum Rate} = \frac{1}{13.5} \times \$95.91 \times 25.236\% = \$1.79$$

This finding by the Commission is based on 1980 year-end data, the most recent data available. This decision, however, does not preclude future rate negotiations between the parties based on the availability of more recent data.

[6] See generally, n. 1, *supra*.

Where the amount of the overcharge has been substantial, it has generally been our policy to order refunds of the overpayments (with interest) commencing from the date the CATV operator filed the complaint. While we have determined that the maximum just and reasonable rate in this proceeding is less than that currently being charged by FPC, we are not persuaded to order a refund at this time. There appears to be a dispute as to whether Cox may owe additional monies for attachments in existence prior to November 2, 1981, the date it filed its complaint. While the Commission's jurisdiction does not extend to adjudication of the extent of a party's contractual obligations, we may, in taking remedial action, consider the fact that there appears to be a bona fide contractual dispute over the issue of monies owned for service received.[7] Under these circumstances a refund order would be premature. Instead, we will allow the parties an opportunity to first resolve their disputes. If such resolution does not ultimately take into account any overpayment Cox may have made since November 2, 1981, we will grant complainant leave to return to the Commission to request appropriate action regarding the refunding of overcharges.

Ordering Clauses

10. Accordingly, IT IS ORDERED, pursuant to Sections 0.291 and 1.1401-1413 of the Commission's

[7] FPC requests that if the Commission determines its rates are unjust, it be given authority to conduct discovery as to the likely effects of the remedies sought by Cox, and that copies of any final action be served on local franchising authorities. FPC has presented no compelling reasons for granting these procedural requests, which are not contemplated by the rules, and therefore, they are denied.

Rules, 47 C.F.R. §§ .291 and 1.1401-1413, That the complaint of Cox is GRANTED to the extent indicated above.

11. IT IS FURTHER ORDERED, pursuant to Sections § 0.291 and 1.1410(a) of the Commission's Rules, 47 C.F.R. §§ 0.291 and 1.1410(a), That the existing annual rate of $5.50 or $11.47 for each pole attachment arising out of the agreement between FPC and Cox IS TERMINATED, effective upon the release of this Order.

12. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1410(b) of the Commission's Rules, 47 C.F.R. §§ 0.291 and 1.1410(b), That an annual rate of $1.79 for each pole attachment IS SUBSTITUTED for the existing rates in the contract described in paragraph 11, effective upon release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Jay L. West
for GARY M. EPSTEIN
Chief, Common Carrier Bureau

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. PA-81-0008

In the Matter of

TELEPROMPTER CORPORATION and
TELEPROMPTER SOUTHEAST, INC., COMPLAINANTS

v.

FLORIDA POWER CORPORATION, RESPONDENT

File No. PA-81-0023

In the Matter of

ACTON CATV, INC., d/b/a
BROOKVILLE PROPERTIES VENTURE
and PASCO ASSOCIATES VENTURE, COMPLAINANTS

v.

FLORIDA POWER CORPORATION, RESPONDENT

MEMORANDUM OPINION AND ORDER

Adopted: July 12, 1981; Released: July 16, 1981

By the Acting Deputy Chief (Operations), Common Carrier Bureau:

1. Before the Bureau, pursuant to delegated authority, are two joint complaints filed under Section 224 of the Communications Act, 47 U.S.C. § 224, against Florida Power Corporation (FPC). Complainants collectively allege that FPC has imposed unjust and unreasonable rates for cable television pole attachments. Section 224 empowers the Commission to adjudicate disputes between cable television system operators and telephone and electric utilities concerning alleged unjust or unreasonable attachment rates, terms or conditions. These two complaints are virtually identical in their analysis and arguments and FPC has filed uniform responses. Therefore, we may, in one order, make uniform findings as to the just and reasonable rates. For reasons to be explained, we conclude that FPC is charging unjust and unreasonably high rates and, moreover, that refunds are warranted.

2. Complainants own and operate cable television systems serving communities in Florida. Pursuant to contracts with FPC, they have attached distribution facilities to the utility's poles, and they pay rates annually under the terms of the contracts.[1]

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[1] FPC preliminarily argues that the Commission lacks jurisdiction to alter pole attachment contracts entered into voluntarily prior to the effective date of Section 224. The Commission, however, has previously determined that it does have this authority and we need not explain the rationale once again. *See First Report and Order in CC Docket 78-144*, 68 FCC 2d 1585, 1591 (1978), *aff'd on recon., Second Report and Order in CC Docket No. 78-144*, 72 FCC 2d 59, 67 (1979) ("*Second Report*"), *aff'd sub nom. Monongahela Power Company* v. *Federal Communications Commission*, No. 80-1390 (D.C. Cir., May 15, 1981) ("*Monongahela Power*").

3. Using information provided by FPC and applying the formula established by Section 1.1409(c) of the Commission's Rules, 47 C.F.R. § 1.1409(c), the operators calculate the maximum just and reasonable annual rate is $2.21 per year per attachment.[2] They therefore urge us to substitute this lower rate for the $6.51/$7.15 per pole per year rate contained in the contracts and, further, to order appropriate refunds. FPC, by contrast, argues not only that the $6.51/$7.15 rate is reasonable, but that a rate of $9.63 is fully justified under the pole attachment rate formula.

4. Section 1.1409(c) of the Commission's Rules, 47 C.F.R. § 1.1409(c), provides that the maximum "just and reasonable" rate for pole attachments is to equal the percentage of the total usable space occupied by the pole attachment times the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. This rule, expressed as a formula, is as follows:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \text{Operating Expenses} + \text{Capital Costs of Poles}$$

In the instant case, the parties' dispute centers on all of these elements.

5. *Total Usable Space and Space Occupied by CATV*. The arguments of the parties regarding usable pole space and space occupied by CATV are substantially identical to those in *Cable Information Services, Inc.* v. *Appalachian Power Company*, 81 FCC 2d 383 (1980) ("*C.I.S.*"). Complainants have used 13.5 feet as the average usable space figure and twelve inches as the space occupied by CATV. These figures comport with the Commission's rules and prior decisions. FPC, on the other hand, argues that the Commission should have adopted an average of 11 feet of usable space per pole rather than 13.5 feet and that the space occupied by CATV should be 52 inches. The Commission rejected arguments supporting these figures in *C.I.S.*, 81 FCC 2d at 385-86. There is no need to repeat the Commission's rationale for using the 13.5 feet and one-foot figures in the rate formula.

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[2] Pursuant to the agreement, Teleprompter is charged an annual rental rate of $5.50 per pole for the year ending December 31, 1977, $5.74 per pole for 1978, $5.98 per pole for 1979, $6.24 per pole for 1980, $6.51 per pole for 1981, and $6.79 per pole for 1982. Acton is charged $7.15 per pole per year per its contract dated June 16, 1980.

6. *Operating Expenses and Capital Costs of Poles*. The final formula element to be determined is operating expenses and capital costs of poles. Although operating expenses and capital costs of poles (also known as "carrying charges") can be expressed directly as dollar amounts, these costs may also be expressed as a percentage of net pole investment. Section 1.1404(g)(9), 47 C.F.R. § 1.1404(g)(9). Thus, the operating expenses and capital costs of poles normally are determined from the net cost of a bare pole and the carrying charges attributable to the cost of owning a pole.

7. *Net Cost of Bare Poles*. Complainants, in their initial complaint, calculate FPC's investment per bare pole by using information contained in publicly available documents, such as Respondent's Federal Energy Regulatory Commission ("FERC") Form 1, in order to compute certain elements by which the maximum lawful rate is calculated. Complainants, in order to assess these values, made certain assumptions initi-

ally based upon information concerning other carriers similarly located geographically for net investment of bare poles, depreciation, rate of depreciation, total number of poles owned by respondent, and other information associated with carrying charges. In this manner they arrived at a maximum lawful rate of \$1.38. This approach was taken because FPC failed to respond to complainants' letters of inquiry.

8. Subsequently, in its Reply and Motion for Leave to File, FPC provided updated and corrected information through December 31, 1981. Based upon this information complainants have corrected their complaint to coincide with the new information and developed a maximum lawful rate of \$2.21.

9. FPC, on the other hand, calculates two annual pole attachment rates. The first, determined generally in accordance with this Commission's Reports and Orders (see footnote 1), arrives at a maximum lawful rate per pole of \$2.51. The second rate, \$10.10, is determined in accordance with FPC's conception of a fair and just rate if complainants owned their own pole system. Since the latter is not the case, we will concern ourselves only with the existing situation which as explained corresponds in form with our previous orders. We then adjust this showing only as necessary to enable us to arrive at the maximum lawful rate.

10. FPC submitted updated figures[3] listing the net cost of a bare pole at a figure of \$95.91. Complainants take issue with this figure but offer no

[3] FPC submitted a motion for leave to file amendments to its original response filed on January 21, 1981. The amendments updated statistical information as well as the income tax carrying charge calculations. Additional legal arguments were also made. Complainants object to this motion. Because

substantive alternative. We see no problem with FPC's figures and therefore accept its calculation of \$95.91.

11. *Carrying Charges.* This brings us to the dispute over carrying charges. FPC originally responded to complainants' inquiries with a 33.70% carrying charge. In their reply, complainants, while not submitting an alternative figure, question FPC's methodology for adjustment of its gross administrative carrying charge as well as its gross tax charges for application to net investment by multiplying the gross charge by the rates of gross to net pole investment. Complainants suggest that these charges are related to the entire plant and should be adjusted only by the ratio of gross to net plant. In addition, complainants allege that FPC calculation of the gross tax component of the carrying charge is inconsistent with the Commission's methodology in *Teleprompter of Fairmont, Inc.* v. *Chesapeake & Potomac Telephone Co. of West Virginia*, 79 FCC 2d 232 (1980), *aff'd on recon.* 85 FCC 2d 243 (1981).

12. We find FPC's approach in calculating the ratio of gross pole investment to net pole investment to be reasonable. That figure was derived as follows:

$$\frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = \frac{\$88,975,480}{\$59,647,989} = 1.4917$$

13. FPC's other carrying charges must be adjusted to properly compute the maximum carrying charge. Those to be adjusted include maintenance expense, administrative expense, and federal, state, other taxes. All figures used are from FPC's FERC

the filing does contain important new information and we seek to have the most recent, accurate data available in the record, we will accept the filing.

Form 1 for 1980. The maintenance expenses component equals the FERC account 593 divided by the corresponding gross investment in account 364 (Poles, Towers, and Fixtures), account 365 (overhead conductors and devices), and account 369[4] (Services), then multiplied by the gross pole/net pole investment conversion ratio of 1.4917. FPC has failed to include account 369 in its calculation. By including account 369, the Maintenance Expense rate for gross investment changes from 6.35% to 4.48%. Multiplying 4.48% X 1.4917 we arrive at a maintenance expense rate for net investment of 6.69%:

$$\frac{\text{FERC 593}}{\text{FERC 364 + 365 + 369}} = \frac{\$10{,}581{,}432}{\$88{,}957{,}480 + \$77{,}537{,}356 + 69{,}424{,}614}$$

$$= \frac{\$10{,}581{,}432}{\$235{,}937{,}450} = \frac{0.0448}{4.48\%} \text{ or Maintenance Expense for Gross Investment}$$

4.48 % × 1.4917 = .0669 or 6.69% Maintenance Expense for Net Investment

14. FPC, in calculating administrative expense, included the total administrative expense of $29,943,156. The accounts we accept for purposes of calculating General and Administrative expense are the accounts that appear to have amounts related to pole attachments, based upon an examination of the Uniform System of Accounts for Electric Companies. These accounts are Administrative and General Salaries ($8,088,229), Office Supplies and Expenses ($3,459,402), Administrative Expenses Transferred [Credit] [$29,030] and Regulatory Commission Expenses ($305,316); giving a total allowable Administrative Expense of $11,753,917. By dividing the total

[4] *See* United States of America, Federal Power Commission, *Uniform Systems of Accounts* Prescribed for Public Utilities and Licensees.

allowable Administrative Expense by the Gross Plant Investment of $2,078,396,138, we arrive at a 0.56% Administrative expense rate for Gross Investment. Multiplying this number by the gross plant/net plant investment conversion ratio of 1.297,[5] we obtain the maintenance expense component of 0.726%. FPC has improperly used the gross to net pole investment ratio. However, G & A and Taxes relate to total electric operations. Therefore, the ratio of Gross Plant to Net Electric Plant in service is the proper calculation.

15. The final components for carrying charges which require adjustments are the federal, state and other taxes. FPC has used standard levelized fixed charge rate equations for calculation of its taxes. Consistent with the Commission's practices, we will use the actual taxes paid by FPC multiplied by the gross plant/net plant investment conversion ratio of 1.297 to determine this portion of the carrying charge.

$$\text{Taxes} = \frac{\text{Ad Valorem Taxes} + \text{Federal Income Taxes} + \text{State Income Taxes} \times 1.297}{\text{Gross Plant Investment}}$$

$$\frac{\$53{,}373{,}765 + (-\$26{,}867{,}971) + \$1{,}123825 \times 1.297}{\$2{,}078{,}396{,}138} = 1.72\%$$

16. The total carrying charges, 25.026%, equal the sum of the individual components derived above plus those of FPC's which did not require adjustment, shown as follows:

[5] To obtain the gross plant/net plant investment conversion ratio:

$$\frac{\text{Gross Electric Plant}}{\text{Net Electric Plant}} = \frac{\$2{,}078{,}396{,}138}{\$2{,}078{,}396{,}138 - \$475{,}940{,}294} = 1.2970$$

	% of Net Pole Cost
Return (Cost of Capital)	9.31%
Maintenance to expense	6.69%
Administrative Expense	0.726%
Depreciation	6.79%
Fed/State & Other Taxes	1.72%
TOTAL	25.236%

Therefore, the maximum carrying charge in this instance, after all adjustments, is 25.236%.

17. *Maximum Rate.* By inserting the values developed in paragraphs 5-16 into the formula, as follows, we calculate that the maximum rate per attachment is \$1.79:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \text{Cost of a Bare Pole} \times \text{Carrying Charges}$$

$$\text{Maximum Rate} = \frac{\text{1 Foot}}{\text{13.5 Feet}} \times \$95.91 \times 25.236\% = \$1.79$$

18. Under Section 224 of the Act and our underlying rules, \$1.79 per pole attachment per year is thus the maximum just and reasonable rate FPC may charge. As noted, however, FPC has been charging \$6.51/\$7.15 (see footnote 2) per attachment annually during the period covered by these complaints. The conclusion is inescapable, therefore, that FPC's rates are unjust and unreasonable within the meaning of the Act.

Other Issues

19. Complainants also allege that FPC is attempting to charge them a "one-time rental charge" of \$16.50 per anchor and that this charge is unlawful. Complainants also state that the respondent must support any such charge by the same cost justification as prescribed for pole attachments. FPC argues that an anchor attachment is not an "attachment by a cable television system to a pole, duct, conduit, or

right-of-way owned or controlled by a utility," and the Commission does not have jurisdiction under 47 U.S.C. § 224 to pass upon Complainants' challenge of the reasonableness of the utility's anchor attachment rates. We cannot agree. The Commission, under the Pole Attachment Act, Pub. L. No. 95-234, has the authority to challenge the reasonableness of FPC's anchor charges. However, because the record is inadequate on this point, we are unable to reach any conclusive finding at this time. Therefore, at this time we will take no further action in this matter, but rather leave to the parties the problem of settling their differences on unauthorized attachments.

Remedies

20. Where, as here, substantial overcharges are established by the record, a refund of excess payments retroactive to the date of the filing of the complaints, plus interest, is proper. For the same reasons described in *C.I.S.*, we are ordering a refund reflecting the difference between the \$1.79 rate and the \$6.51/\$7.15 rate currently being charged complainants for all payments in excess of the \$1.79 rate made since November 13, 1980, and April 13, 1981 (when Teleprompter and Acton filed their complaints), as specified below. See discussion in *C.I.S.*, 81 FCC 2d at 392-93.

21. In addition, the Commission has determined previously that the current interest rate for Federal tax refunds and additional tax payments is the appropriate rate of interest on the overcharges. *See Teleprompter of Fairmont, Inc.* v. *Chesapeake and Potomac Telephone Company of West Virginia, supra.* It has also taken official notice that the Commissioner of Internal Revenue has set a rate of 12 percent per year effective February 1, 1980, thereby

increasing the rate from 6 percent. Rev. Rul. 79-365, 79-45 I.R.B. 16.

22. An annual interest rate of 12 percent will then be imposed from the respective dates the complaints were filed until the payment of the refunds by FPC.

ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to Sections 0.291 and 1.1401-1413 of the Commission's Rules, 47 C.F.R. §§ 0.291 and 1.1401-1413, That the complaint of Acton CATV, Inc. d/b/a Brookville Properties Venture and PASCO Associates Venture and Teleprompter Corp. and Teleprompter Southeast, Inc., ARE GRANTED to the extent indicated above.

24. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1410(a) of the Commission's Rules, 47 C.F.R. §§ 0.291 and 1.1410(a), That the existing annual rate of $6.51/$7.15 for each pole attachment arising out of the agreement between Florida Power Corporation and Complainants IS TERMINATED, effective upon the release of this Order.

25. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1410(b) of the Commission's Rules, 47 C.F.R. §§ 0.291 and 1.1410(b), That an annual rate of $1.79 for each pole attachment IS SUBSTITUTED for the existing rate in the contract described in paragraph 2, effective upon release of this Order.

26. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1410(c) of the Commission's Rules, 47 C.F.R. §§ 0.291 and 1.1410(c), That Florida Power Corporation SHALL REFUND, within (30) days of release of this Order:

(a) to Teleprompter Corporation and Teleprompter Southeast, Inc., excess payments made since November 18, 1980. These excess payments for which refunds are ordered consist of the difference between the payments made and payments based on the maximum lawful annual rate of $1.79 per attachment. This refund shall consist of the excess payments included in the first payment (prorated from November 18, 1980) and all subsequent payments made after November 18, 1980.

(b) to Acton CATV, Inc. d/b/a Brookville Properties Venture and PASCO Associates Venture, excess payments made since April 13, 1981. These excess payments for which refunds are ordered consist of the difference between the payments made and payments based on the maximum annual rate of $1.79 per attachment. This refund shall consist of the excess portions included in the first payment (prorated from April 13, 1981) and all subsequent payments made after April 13, 1981.

27. IT IS FURTHER ORDERED, That the refunds shall bear interest at an annual rate of 12 percent simple interest from the filing dates of the complaints, until the date of full payment to each complainant.

FEDERAL COMMUNICATION COMMISSION

/s/ Jay L. West
for Jack D. Smith
Acting Deputy Chief
(Operations)
Common Carrier Bureau

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-3683
84-3904

FCC Nos. PA-81-0008, PA-81-0023 & PA-82-0005

FLORIDA POWER CORPORATION, PETITIONER

versus

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT

Petitions for Review of an Order of the
Federal Communications Commission

Before RONEY and FAY, Circuit Judges, and DUMBAULD*, District Judge.

JUDGMENT

These causes came on to be heard on the petitions of Florida Power Corporation for review of an order of the Federal Communications Commission, and were argued by counsel;

---

* Honorable Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that upon the petitions for review, the order of the Federal Communications Commission in these causes be, and the same are hereby, VACATED;

It is further ordered that respondent pay to petitioner, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 8, 1985

For the Court: Spencer D. Mercer, Clerk

By: /s/
Deputy Clerk

Issued as mandate: Nov. 21, 1985

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3683
84-3904

FLORIDA POWER CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT

[Filed Nov. 12, 1985]

Petitions for Review of an Order of the
Federal Communications Commission

ON PETITIONS FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC

(Opinion October 8, 1985, 11 Cir., 1985, — F.2d —)
(November 12, 1985)

Before RONEY and FAY, Circuit Judges, and DUMBAULD,* District Judge.

* Hon. Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
United States Circuit Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-3683, 84-3904

FLORIDA POWER CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, RESPONDENTS

GROUP W CABLE, INC., ET AL., INTERVENORS

Filed December 10, 1985

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 9th day of December, 1985, that respondents Federal Communications Commission and United States of America hereby appeal to the Supreme Court of the United States from a judgment of this Court entered in the captioned cases on the 8th day of October, 1985, petition for rehearing and suggestion of rehearing *en banc* denied on the 12th day of November, 1985, in favor of petitioner Florida Power Corporation.

This appeal is taken pursuant to 28 U.S.C. 1252 and 28 U.S.C. 2101(a).

Respectfully submitted,

JACK D. SMITH
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

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Department of Justice
Washington, D.C. 20530

APPENDIX H

47 U.S.C. 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and

appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312 (b) of this title.

(2) Within 180 days from February 21, 1978, the Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions not pre-empted by activities of Commission; certification of State regulation to Commission

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

> (A) it regulates such rates, terms, and conditions; and
>
> (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

U. S. GOVERNMENT PRINTING OFFICE, 1986 491507 20173

Nos. 85-1658 (2)
85-1660 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals For The Eleventh Circuit

---

MOTION TO AFFIRM

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33 pp

QUESTIONS PRESENTED

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court held that a New York statute authorizing the permanent physical attachment of cable television equipment to a New York City apartment building constituted a taking *per se* of the building owner's property. The questions presented in this proceeding are:

1. Was the Eleventh Circuit correct in holding that a federal statute which authorizes the permanent physical attachment of cable television equipment to the property of a private utility company constitutes a taking of the utility company's property, for which just compensation is required?

2. If so, may Congress impose a binding rule on the Judiciary limiting the compensation that may be awarded for that taking?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-1658
85-1660

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

---

MOTION TO AFFIRM

Tampa Electric Company, Alabama Power Company, Mississippi Power & Light Company, and Ar-

izona Public Service Company ("Utility Parties"),[1] hereby move for the Court to affirm the decision below of the United States Court of Appeals for the Eleventh Circuit. In support hereof, Utility Parties respectfully state as follows:

INTRODUCTION

The decision of the Eleventh Circuit below applied clear precedents of this Court in a straightforward manner to an undisputed set of facts. In finding a taking of Florida Power Corporation's property, the Eleventh Circuit reached the same conclusion as the District of Columbia Circuit in an earlier case; thus, there is no conflict among the circuits. The decision

[1] Pursuant to Sup. Ct. R. 28.1, following are the affiliates and subsidiaries of the Utility Parties: Tampa Electric Company and its following affiliates are wholly-owned subsidiaries of TECO Energy, Inc.—Tampa Bay Industrial Corporation; TECO Transport and Trade Corporation; Southern Marine Management Company; Gulf Coast Transit Company; GC Services Company Inc.; Mid-South Towing Company; Electro-Coal Transfer Corporation; TECO Coal Corporation; and Gatliff Coal Company. Intervenor Mississippi Power & Light Company has the following subsidiaries and affiliates—Arkansas Power & Light Company; Louisiana Power & Light Company; Middle South Energy, Inc.; Middle South Services, Inc.; Middle South Utilities, Inc.; New Orleans Public Service Inc.; and System Fuels, Inc. Intervenor Alabama Power Company has the following subsidiaries and affiliates—Georgia Power Company; Gulf Power Company; Mississippi Power Company; Piedmont Forest Corporation; Southern Company Services, Inc.; Southern Electric Generating Company; Southern Electric International, Inc.; and The Southern Company. Intervenor Arizona Public Service Company is a wholly-owned subsidiary of AZP Group, Inc., and has the following subsidiaries and affiliates—APS Fuels Company; APS Finance Co., N.V.; and Bixco, Inc.

below was unanimous, and no judge voted for either panel rehearing or rehearing *en banc*.

At issue in this proceeding are several thousand dollars in pole attachment fees. Both Group W and Florida Power, the principal parties in interest, have assets well in excess of a billion dollars. The Utility Parties in no way intend to disparage the importance of this proceeding, either to the cable companies involved or to any other party. At the same time, however, this does not appear to be a case of "peculiar gravity and general importance," *American Construction Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 383 (1893), nor is it a matter "affecting the interests of this nation in its internal and external relations," *Forsyth v. City of Hammond*, 166 U.S. 506, 515 (1897).

The decision of the court of appeals below was a model of careful and thoughtful judicial analysis. The Utility Parties submit that review should be denied and the decision below affirmed.

COUNTERSTATEMENT OF THE CASE

A. The FCC's Arbitrary Regulation of Pole Attachments

As recounted by the court below, since the advent of cable television in the 1950s, most cable companies have constructed their distribution systems by attaching their equipment to the distribution poles owned by telephone and electric utilities. The attachments are made pursuant to contracts between the pole owner and the cable company, and usually specify a small annual fee to be paid to the pole owner.

In 1978, Congress enacted legislation providing the Federal Communications Commission with jurisdiction

to regulate the rates that pole owners may charge to cable companies. Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C. § 224 (West Supp. 1985)) ("Pole Attachment Act"). Congress directed the FCC to set "just and reasonable" rates, and established a binding formula for the FCC to use in determining the rates that may be charged for pole attachments. Pursuant to that formula, the FCC has ruled that on a typical utility pole, cable companies may be charged no more than one-thirteenth of the proven costs of owning and maintaining the pole. *Second Report and Order in CC Docket 78-144*, 72 F.C.C. 2d 59 (1979). The FCC also ruled that Congress intended the Act to be interpreted in such a way as to promote the economic growth of the cable industry, rather than simply to provide for the neutral determination of costs, as in most other regulatory statutes. *Id.* at 74.[2]

Regrettably, the Commission's enforcement of the Act has been one-sided and discriminatory. The FCC's Common Carrier Bureau, for example, has enforced its procedural rules with exacting strictness against utilities, while overlooking defects in pleadings submitted by cable companies. *Compare Caddo-Cable Communications Corp. v. Southwestern Electric Power*

[2] The cable interests contend, and the Act is premised upon the notion, that cable operators have no alternative but to attach their equipment to utilities' property. However, it is quite feasible to place cable facilities underground instead. In point of fact, both utilities and cable operators increasingly are forced to bury their facilities because of community opposition to above-ground lines. *Cf.* S. Rep. No. 580, 95th Cong., 1st Sess. at 18 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 109, at 126.

Corp., Mimeo No. 2430 (released Feb. 15, 1984) (rejecting pleading filed two days late by utility), *and Liberty TV Cable, Inc. v. Georgia Power Co.*, Mimeo No. 1842 (released Jan. 29, 1982) (refusing extension of time requested by utility to complete cost study), *with RVS Cablevision Corp. v. Southwestern Electric Power Co.*, Mimeo No. 2718 (released March 12, 1982) (waiving failure by cable company to meet service requirements); *Teleprompter Corp. v. Montana Power Co.*, Mimeo No. 000737 (released May 8, 1981) (waiving two procedural defects in complaint of cable operator), *and Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Tel. Co. of West Virginia*, 85 F.C.C. 2d 293 (1981) (waiving defects in cable operator's complaint, but refusing to consider new evidence submitted by telephone company).

Similarly, the FCC has taken a myopic view of utility costs, tilting its rate calculations in favor of producing lower rates than would be produced by an even-handed analysis. For example, the FCC permitted utilities to charge cable operators for their share of the cost of a pole, but not for their share of the cost of the land on which it sits, even when the utility was forced to purchase the land right. *Williamsburg Cablevision v. Carolina Power & Light Co.*, Mimeo No. 1961 (released Jan. 26, 1983). The FCC permitted utilities to include administrative and general salaries in their rates, but not the cost of corresponding employee pensions and benefits, even though the expense to a utility of money paid to an employee directly in a salary and money set aside in a pension fund are the same. *Teleprompter Corp. v. Florida Power & Light Co.*, 54 Rad. Reg. 2d (P&F) 1391 (1983).[3] The

[3] The FCC even went so far as to rule that telephone com-

FCC often has refused to process cases filed by utilities, allowing them to languish for years in the Commission's files, but expedites matters filed by the cable companies.[4]

All of this led the D.C. Circuit, in a recent appeal of an FCC pole attachment order, to hold that "the Commission's somewhat casual calculation[s]," reflect "the sort of 'clear error[s] of judgment' . . . and absence of 'rational connection[s] between facts found and the choice[s] made' as to render them arbitrary and capricious," *Alabama Power Co. v. FCC*, 773 F.2d 362, 372 (D.C. Cir. 1985), quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962). Likewise, the Fifth Circuit recently held that the rate formula established by the FCC is "inconsistent, arbitrary and essentially unworkable." *Texas Power & Light Co. v. FCC*, 784 F.2d 1265, 1275 (5th Cir. 1986).

panies, long subject to its jurisdiction, may recover their expenses relating to property insurance, but that electric utilities could not. *Cf.* Teleprompter Corp. v. Southern Bell Tel. & Tel. Co., Mimeo No. 1315 (released Dec. 16, 1983) (allowing telephone company to recover property insurance expense), with Teleprompter Corp. v. Alabama Power Co., Mimeo No. 33976 (released Nov. 3, 1983) (disallowing electric utility recovery of property insurance expense). As a result of the FCC's gerrymandering of the statutory rate formula, pole attachment rates were often reduced 80-90% from the pre-existing, contractually agreed-upon level. *E.g.*, Tele-Communications, Inc. v. Mountain States Tel. & Tel. Co., Mimeo No. 1948 (released Dec. 27, 1983) (80% reduction when rate lowered from $4.00 to $0.83).

[4] In this case, for example, the FCC ruled on Teleprompter's complaint within eight months of when it was filed, but refused to process Florida Power's application for review for three years.

B. The Federal Communications Commission's Mishandling of the Case Below

The FCC's handling of the case below was of a piece with its arbitrary handling of other pole attachment cases. Teleprompter Corp. and several other cable firms filed complaints at the FCC in 1980 and 1981, asking the FCC to abrogate their pole attachment contracts and substitute lower rates for the rates they had agreed to in their contracts with Florida Power. Florida Power responded by demonstrating that its rates were fully justified under the Act, and pointing out that the relief requested by the cable operators would violate constitutional prescriptions against the taking of private property for public use without just compensation.

The FCC's Common Carrier Bureau granted the cable operators' request in full, and in fact, lowered the rates even further than the cable operators had requested.[5] Although the cable operators had not objected to paying the maintenance expenses established by Florida Power, the FCC on its own disallowed the majority of this expense. The Common Carrier Bureau disallowed more than half of the administrative expenses documented by Florida Power, and permitted only four limited categories of expense to be recovered, a methodology later held to be arbitrary and capricious by the District of Columbia Circuit. *Alabama Power Co. v. FCC*, 773 F.2d at 370. The Bureau permitted Florida Power to recover less than one-

[5] In dozens of cases, including all of the complaint cases that have been reviewed by the appellate courts, the FCC reduced the rates of the utility even lower than the cable operators had requested.

third of its tax expenses, a policy rejected by the courts in both *Alabama Power Co.*, 773 F.2d at 371, and *Texas Power & Light Co.*, 784 F.2d at 1272. Finally, the Bureau completely ignored Florida Power's constitutional arguments.

Florida Power filed a timely application for administrative review, requesting the full Commission to reverse the Common Carrier Bureau's ruling, and pointing out glaring errors in the Bureau's rate computation. Rather than ruling on Florida Power's appeal, however, the FCC staff refused to process the application, as it had delayed many other such applications. 1981 passed. 1982 passed. 1983 passed. Finally, late in 1984, the Commission issued a brief decision rejecting all of Florida Power's rate and constitutional arguments, and summarily affirming the Common Carrier Bureau's earlier actions.

C. The Decision of the Court of Appeals

On appeal, the Eleventh Circuit agreed with Florida Power and vacated the FCC's order. The court of appeals applied the recent decision of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and found, as had the District of Columbia Circuit in *Alabama Power Co. v. FCC*, 773 F.2d at 367 n.8, that the FCC order authorizing the permanent physical occupation of Florida Power's property for less than one-third of the rate agreed to by Teleprompter Corp. (and its successor-in-interest, Group W Cable, Inc.) constituted a taking of Florida Power's property. Having found a taking, the court of appeals went on to hold that the procedures established under the Pole Attachment Act were inadequate to ensure that Florida Power will receive just compensation as required by the fifth amendment. The court held that the key constitutional principle of separation of powers precludes Congress from prescribing a binding rule for the determination of just compensation, which, the court held, is a judicial function. Since the Pole Attachment Act prescribes just such a binding rule, the court held that the Act was constitutionally inadequate, and vacated the FCC's order. For this point, the Eleventh Circuit relied upon cases dating as far back as *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), as well as more recent precedents.

The cable companies raise the specter that the Eleventh Circuit's decision will overburden the federal courts with determinations of just compensation arising from the regulatory decisions of administrative agencies. Group W Statement at 27; Texas Cable Statement at 9. This alleged threat to the judiciary's caseload, however, is based on the cable interests' erroneous theories that the Act is merely economic regulation rather than a taking and that the Eleventh Circuit's decision denies administrative agencies any role in the establishment of just compensation. Since neither of these theories is correct, the allegations of the cable companies are wide of the mark.

The Utility Parties submit that each point of the Eleventh Circuit's analysis is correct and well grounded in the decisions of this Court.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE LORETTO DOCTRINE TO THE FACTS OF THIS CASE.

The fifth amendment to the United States Constitution prohibits the taking of private property for

public use without the payment of just compensation. For many years, the courts have struggled to determine when a governmental interference with property rights will constitute a "taking." In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court provided guidance as to when a taking will be found.

The issue in *Loretto*, as stated by Justice Marshall, was "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which compensation is due under the Fifth and Fourteenth Amendments of the Constitution." 458 U.S. at 421. This Court answered that question in the affirmative.

Loretto involved a New York statute that prohibited landlords from interfering with the installation of cable television facilities on their premises, as well as prohibiting them from charging cable operators more than a one-time fee of $1.00 for the right to occupy their property. 458 U.S. at 424. The New York Court of Appeals upheld the statute as a legitimate exercise of the police power. *Id.* This Court reversed on the grounds that application of the statute effected a taking. *Id.* at 426.[6]

The rule established in *Loretto* is refreshingly simple: a permanent physical occupation authorized by

[6] Historically, this Court has taken a much stricter view of physical invasions of property than of nonpossessory regulations on use. In *Loretto*, as in this case, a physical invasion of property was at issue. Most of the cases cited by the cable interests as somehow being inconsistent with the Eleventh Circuit's decision do not involve compelled physical invasions, and thus are easily distinguishable. *See Loretto*, 458 U.S. at 440 n.19.

the government is a taking *per se*. *Id.* at 434-35. Application of that standard to the facts of this case leads inescapably to the conclusion that Florida Power's property has been taken in the same manner and to the same degree as was the New York landlord's property in *Loretto*.

The equipment Teleprompter (and later Group W Cable) attached to Florida Power's poles, as the court of appeals noted, is "virtually indistinguishable" from the equipment it attached to Mrs. Loretto's apartment house in New York. 772 F.2d at 1544. There can be no dispute that the equipment physically occupies Florida Power's distribution poles.

It is also clear that these attachments are neither temporary, nor invited at the reduced rates mandated by the FCC. Many utilities have had cable attachments on their poles continuously since the 1950s—a period of some 30 years. Moreover, the attachments have been authorized or compelled by the government on numerous occasions. In several cases, the FCC has ruled that utilities may not refuse to permit cable operators to occupy space on their poles, and in one case ruled that a utility must expand its facilities to make room for additional new cable attachments.[7]

[7] Group W, in an attempt to distinguish *Loretto*, asserts that because Florida Power is subject to regulation as an electric utility it is not entitled to fifth amendment protection with regard to the physical occupation of its property by cable companies. Of course, this overlooks the fact that Mrs. Loretto's apartment house was dedicated to the New York housing market and subject to New York City's rent control law. This Court found no diminution of her constitutional rights, however. Group W is essentially trying to create a "utility exception" to the fifth amendment, a theory that must be firmly rejected. This

For example, utilities and cable operators at times have become embroiled in disputes over such items as late payment (and non-payment) of rentals, unsafe attachments not in compliance with safety code requirements, the making of unauthorized attachments, and so on. In each of these cases, the FCC has issued orders preventing the utilities involved from terminating service to the cable operators, even where the cable operator had violated the pole attachment agreement or where a termination provision was lawfully invoked. *E.g.*, *Whitney Cablevision v. Southern Indiana Gas & Electric Co.*, Mimeo No. 841 (released Nov. 16, 1984); *Tele-Communications, Inc. v. South Carolina Electric & Gas Co.*, Mimeo No. 5957 (released Aug. 16, 1983). The cable interests fail to cite even a single instance in which a utility was permitted by the FCC to refuse to allow a cable operator to continue to occupy space on its poles. Clearly, the FCC's rules and decisions authorize the cable operators to occupy utility poles for a sufficient duration that they meet the *Loretto* decision's test of permanency, rather than being merely temporary or intermittent.[8]

Court recently rejected the notion that utilities were somehow not entitled to the full constitutional protections accorded other parties. Pacific Gas and Elec. Co. v. Public Util's Comm'n of California, 106 S.Ct. 903 (1986). *See also* Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York, 447 U.S. 530 (1981). There is no need for a replay of those cases now.

[8] The government suggests that the case may not be ripe for review because Florida Power has not yet attempted to physically remove Teleprompter's equipment. Such a move would clearly be futile in light of the FCC's numerous rulings prohibiting utilities from doing precisely that. Furthermore, the government's argument is inconsistent with this Court's holding in Northern

In another case, *David Bailey d/b/a Port Gibson Cable TV v. Mississippi Power & Light Co.*, Mimeo No. 36118 (released Sept. 11, 1985), a utility was asked by a cable operator to replace approximately 50% of its poles in a small town in Mississippi in order to accommodate an additional cable operator. The utility protested that the cost would be prohibitive, that its personnel were unavailable, and that the community was already served by one cable television operator. The FCC held that the utility must expand its facilities and permit the additional cable company to attach. *Id.* at para. 14. *Port Gibson* flatly contradicts any assertion that cable attachments are simply a matter of invited access. Mississippi Power & Light Company is under direct order by the FCC to permit the occupation of its poles by Port Gibson Cable TV, even on poles where no other cable attachment exists. This can hardly qualify as a case of invited access.[9]

The court of appeals also properly recognized that Florida Power's invitation to Teleprompter to occupy

Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). There, this Court held that bankruptcy judges who are appointed for fixed terms, could be removed for cause, and who could suffer salary diminution, could not constitutionally exercise certain powers granted them in the Bankruptcy Act of 1978. The Court rejected the argument that the case was not ripe for decision because no removal or diminution had been attempted.

[9] The cable interests' assertions are also inconsistent with the arguments they advanced earlier this Term in Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1984), *cert. granted*, 54 U.S.L.W. 3328 (argued April 29, 1986), that the number of cable operators allowed on a utility's poles may not be limited, at least by the government.

its poles at one price does not imply an invitation to occupy its poles at a small fraction of that price established by the FCC. 772 F.2d at 1543. It is a matter of elementary law that a property owner's consent for a stranger to enter his property subject to a condition does not imply consent if the condition is not met. Restatement (Second) Torts § 168 (1965).

Several cable operators suggest that Florida Power suffered no loss when its pole attachment rates were reduced by two-thirds pursuant to the FCC's rate formula, because it allegedly could make up the difference by increasing the rates to its electric ratepayers. Such a suggestion is as poorly conceived in policy as it is erroneous in fact. As the Fifth Circuit recognized in *Texas Power & Light Co.*, it is unreasonable to permit cable operators to escape payment for their share of pole costs by thrusting those costs on the general body of ratepayers. 784 F.2d at 1272. Furthermore, it is untrue that all pole costs not borne by the cable operators are necessarily picked up by electric ratepayers. Many utilities go for years without filing general rate cases. If their rates are premised on receiving a certain amount of revenue from cable operators and that amount is slashed by the FCC, only the utilities lose until their rates are readjusted.[10] Finally, even if the state utility commissions

[10] The cable interests grossly misconstrue the nature of utility ratemaking when they assert that utilities are guaranteed to receive their rate of return. At best, utilities are assured of the opportunity to earn their rate of return, which they may or may not achieve, but they are not assured of receiving anything. The cable interests depict a 19th century view of utility regulation, in which there is a complete monopoly by the utility. This view is inconsistent with the pro-competitive and deregulatory policies

generally did permit the recovery of the shortfall from state ratepayers, the cable operators have cited no proposition of law that would require them to continue the practice.

The court of appeals broke no new ground in finding a taking of Florida Power's property; rather, its decision rests firmly on established precedent of this Court. This conclusion is so clear that this appeal must be seen for what it is—an unjustified request for this Court to revisit *Loretto* by one of the parties to that case. The Court should not entertain that request so soon after issuance of the *Loretto* decision. The Eleventh Circuit carefully and properly reached its conclusion that the permanent physical occupation of Florida Power's utility poles by Teleprompter constitutes a taking of that utility's property.

II. THE POLE ATTACHMENT ACT IS UNCONSTITUTIONAL BECAUSE IT DIRECTS THE FCC TO SET RATES ACCORDING TO A BINDING CONGRESSIONAL FORMULA AND THEREBY FORECLOSES ANY JUDICIAL DETERMINATION OF JUST COMPENSATION.

The Eleventh Circuit correctly found that, in directing the FCC to set pole attachment rates according to a binding formula mandated by Congress, the Act allows Congress to take property and to determine the compensation for that taking. The court recognized that the FCC establishes the pole attachment rates that a utility may charge pursuant to the formula specified by Congress in Section (d)(1) of the

favored by most states, and most electric companies now face competition in their service areas for at least some services. In this environment, their returns are anything but guaranteed.

Act, and concluded that "[b]y prescribing a binding rule in regard to the ascertainment of just compensation Congress has usurped what has long been held an exclusive judicial function." 772 F.2d at 1546. Since ratemaking by the FCC according to this "binding rule" does not provide any opportunity for a judicial determination of just compensation for the *per se* taking of the private property of utilities effected by the FCC's rate orders, the Eleventh Circuit properly ruled that the Act suffers from a fatal constitutional defect. 772 F.2d at 1546.

The government and the cable companies attempt to avoid the weight of the precedent for this holding by setting up the strawman argument that the Eleventh Circuit foreclosed participation by the FCC or any administrative agency in the process of establishing just compensation. Government Statement at 13-14; Group W Statement at 21-24. With all due respect, that is not what the court held. A fair reading of the opinion, in light of the cases relied upon by the court, establishes that the government and the cable companies have ignored the central element of the court's actual holding. The Eleventh Circuit found that the FCC's regulation of pole attachment rates *pursuant to a binding rule established by Congress* offends the Constitution by imposing a legislative limit on just compensation, which must be determined ultimately by the judiciary. Thus, properly viewed, the decision of the Eleventh Circuit is in full accordance with the established case law, and the shrill warnings by the government and the cable companies of the decision's dire consequences for the system of administrative regulation ring hollow.

A. A Legislative Limit on Just Compensation Violates the Constitutional Separation of Powers.

The decision of the Eleventh Circuit rests securely on the principle established by precedent that an act of Congress transgresses the Constitution if it limits the scope of the inquiry into the appropriate measure of just compensation for a taking of private property, an issue which the Constitution entrusts to the judiciary for ultimate determination. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 and 77-78 (1936); *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 364-65 (1936); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893); *Miller v. United States*, 620 F.2d 812, 837 (Ct. Cl. 1980); *American-Hawaiian Steamship Co. v. United States*, 124 F.Supp. 378, 382-83 (Ct. Cl. 1954), *cert. denied*, 350 U.S. 863 (1955); *Hudson Navigation Co. v. United States*, 57 Ct. Cl. 411, 415 (1922). Even the government has admitted the continuing force of case law holding that "Congress cannot circumscribe the ultimate judicial determination of whether the compensation provided is constitutionally adequate by prescribing statutory limits on the amount to be paid." Government Statement at 14 n.15. The FCC's establishment of cable attachment rates under the binding rule in the Act imposes just such a statutory limit on the compensation to the utilities, and, as the Eleventh Circuit correctly held, cannot survive scrutiny under the very constitutional standard conceded by the government.

This Court, in the seminal *Monongahela Navigation Co.* case, explained the basic constitutional defect of a statutory limit on just compensation:

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character, but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

148 U.S. at 327. A Congressional restriction on the measure of just compensation offends the principle of separation of powers which lies "at the heart of the Constitution," *Buckley v. Valeo*, 424 U.S. 1, 119 (1976). The division of responsibilities among the branches of government served a vital purpose in the view of the Framers of the Constitution:

> When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner. . . .
>
> The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.

The Federalist No. 47, at 303, 324 (J. Madison) (J. Cooke ed. 1961) (emphasis in original). For these reasons, "the Constitution diffuses power the better to secure liberty," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), thereby furnishing "a vital check against tyranny," *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). The doctrine of separation of powers, which was so significant to the founders of our system of government, and which underlies the prohibition in *Monongahela Navigation Co.* against statutory limitation of just compensation, remains central to the "very structure" of our Constitution today. *INS v. Chadha*, 462 U.S. 919, 946 (1983).

The Eleventh Circuit quite properly invalidated the FCC's pole attachment ratemaking under the statutory formula as inconsistent with the constitutionally mandated division of responsibility for the taking of private property and the award of just compensation for that taking. As the government concedes in this case, Congress cannot both take property and "constitute itself the judge in its own case" by setting a statutory limit on just compensation. Government Statement at 15 n.15, quoting *Isom v. Mississippi Cent. R.R.*, 36 Miss. 300, 315 (1858).

B. The Opportunity for Limited Judicial Review of FCC Rate Orders Does Not Correct the Constitutional Infirmity of the Act.

In addition to their jeremiads about the implications of the Eleventh Circuit's decision for administrative regulation, the government and the cable interests claim that the Act satisfies the constitutional requirement for an ultimate judicial determination of just compensation based on the availability of appellate

review of FCC rate orders. Government Statement at 14-15; Group W Statement at 26-27. Judicial review of the FCC's pole attachment rate decisions is limited to an administrative record containing only evidence related to the elements of a statutory formula, which does not even purport to establish just compensation. Appellate review of such a narrowly constricted record fails to permit the judicial inquiry into just compensation mandated by the Constitution.

Just compensation for the governmentally authorized taking of private property is a constitutional right, and the ultimate determination of what compensation is just is reserved to the judiciary. *Monongahela Navigation Co. v. United States*, 148 U.S. at 327. This Court has held that the Congressional delegation to an entity other than an Article III court of an adjudicative function reserved to the federal judiciary is not validated by the mere existence of "some degree of appellate review." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.9 (1982). Article III requires the judiciary to retain the authority "to make an informed, final determination" of all constitutional issues. *United States v. Raddatz*, 447 U.S. 667, 682 (1980), quoting *Mathews v. Weber*, 423 U.S. 261, 271 (1976). A court can discharge its responsibility to render ultimate adjudication of a constitutional right only if it has access to all relevant facts. *Id.* A court of appeals reviewing an FCC pole attachment rate order is denied the evidence necessary to exercise its ultimate Article III authority and responsibility since the administrative record does not provide a sufficient basis to determine just compensation and the court cannot engage in fact-finding outside that record.

Appellate review of FCC pole attachment rate orders under the Administrative Procedure Act (5 U.S.C. § 706) is limited to consideration of the record developed before the Commission. "The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 105 S.Ct. 1598, 1607 (1985).

The administrative record in pole attachment proceedings contains only evidence which the FCC deems relevant to its application of the "binding rule" in the Act. The ratemaking formula in the Act thus binds the reviewing court, which has no authority to conduct a *de novo* evidentiary proceeding to develop information on the elements of just compensation.

The FCC's record in pole attachment rate proceedings does not provide a reviewing court with sufficient evidence to determine just compensation. The statutory rate formula applied by the FCC does not even refer to just compensation, but to a "just and reasonable" rate for cable attachments.[11] 47 U.S.C. §§ 224(b) and (d). The binding statutory rule specifies that a "just and reasonable" rate:

> assures a utility the recovery of not less than the additional costs of providing pole attach-

[11] The government mistakenly suggests that the FCC attempts to set just compensation. In the hundreds of pole attachment decisions issued by the FCC, not once has the Commission suggested that it is attempting to set just compensation in accordance with the numerous precedents and judicial decisions bearing on that determination; rather, the focus of the Commission's inquiry is narrower, and is directed solely at applying the binding rule mandated by Congress in the Act.

> ments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d). The binding rule applied by the FCC to establish the maximum rate reduces to the following formula:

$$\text{Maximum Rate} = \frac{1 \text{ foot}}{13.5 \text{ feet}} \times \text{Operating Expenses} + \text{Capital Costs of Poles}$$

Even in the face of direct physical evidence that cable attachments occupy more than one foot of usable space, the FCC has held repeatedly that it is bound under the Act to allocate only one foot of usable space to pole attachments. *E.g.*, *Capital Cities Cable, Inc. v. Arizona Public Service Co.*, Mimeo No. 5059 (released June 29, 1984).

The government attempts to equate pole attachment rates based on the statutory formula with just compensation. Government Statement at 12. The cases cited by the government, however, do not address the proper measure of just compensation for a taking of private property under the fifth amendment. Furthermore, the government has overlooked numerous other cases, cited below, approving and applying other measures for determining just compensation that are ignored in the ratemaking process under the Pole Attachment Act.

The legislative rule for the establishment of "just and reasonable" pole attachment rates based on the arbitrary allocation of selected costs ignores other factors which may be relevant to the determination of just compensation, such as fair market value. *See Kirby Forest Industries v. United States*, 104 S.Ct. 2187, 2191 n.14 (1984); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 126 (1950); *United States v. Miller*, 317 U.S. 369, 374 (1943); *United States v. 320.0 Acres of Land, More or Less, in County of Monroe, State of Florida*, 605 F.2d 762, 781 (5th Cir. 1979); *United States v. 15.3 Acres of Land, Etc.*, 154 F.Supp. 770-78 (M.D. Pa. 1957). However, the FCC restrict the evidence in pole attachment rate cases to the elements of the statutory formula. Judicial review on the basis of such a truncated record is merely an assessment of the FCC's compliance with the Congressional formula, and perpetuates the Act's constitutional defect of circumscribing the ultimate judicial determination of just compensation.[12]

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[12] The cable interests suggest that the Act is constitutional, notwithstanding the inadequacy of judicial review of an administrative record limited to the statutory formula, on the basis of the alleged ability of utilities to obtain just compensation from the Claims Court under the Tucker Act, 28 U.S.C. § 1491 (1982). Group W Statement at 24 n.50. Notably, the government declined to support the Act's constitutionality by reference to the Tucker Act. Government Statement at 15 n.16. The reliance of the cable companies on the Tucker Act is misplaced.

The structure of the Pole Attachment Act and its legislative history require the inference that Congress withdrew Tucker Act jurisdiction with respect to pole attachment rates. The Pole Attachment Act broadly specifies that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable . . . ." 47

CONCLUSION

"[I]f there is a principle in our Constitution, indeed in any free Constitution, more sacred than another,

U.S.C. § 224(b)(1). The only exception to the FCC's regulatory authority over pole attachment rates is "where such matters are regulated by a State." 47 U.S.C. § 224(c)(1). The following statement in the legislative history regarding the structure of the Act confirms that Congress intended the FCC to occupy the entire field of pole attachment rate regulation:

> The basic design of S. 1547, as reported, is to empower the Federal Communications Commission to exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement and where a State or more local regulatory forum is unavailable for resolution of disputes between these parties.

S.Rep. No. 580, 95th Cong., 1st Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 109, 123.

It must be concluded that Congress intended to withdraw Tucker Act jurisdiction over pole attachment rates as inconsistent with the structure and purposes of the Pole Attachment Act.

Furthermore, since the FCC's approach to setting pole attachment rates is based upon an allocation of costs which change over time, the rate established may vary significantly from year to year. Accordingly, the amount that the utility would be entitled to recover under the Tucker Act would similarly vary from year to year. To hold that utilities must resort to the Tucker Act for just compensation would result in an annual ritual whereby the utility would first go to the FCC for a determination of its statutory rights for that year, then (several years later, after exhausting agency and judicial review of the Common Carrier Bureau's decision) go to the Claims Court for its constitutional entitlement for that year. Nor could this process be avoided by the award of a one-time fee as compensation for the taking for all future years. Because CATV operators are con-

it is that which separates the Legislative, Executive, and Judicial powers." 1 Annals of Cong. 581-82 (J. Gales ed. 1789) (J. Madison). Pursuant to that principle, the Eleventh Circuit correctly determined that the fifth amendment does not allow for the determination of just compensation pursuant to a "binding rule" established by Congress. Judicial review of the administrative record limited to evidence relevant to the "binding rule" does not remedy the constitutional deficiency of such a legislatively controlled award of compensation. The Eleventh Circuit correctly ruled that the Pole Attachment Act fails to provide a constitutionally adequate means for determining just compensation.

WHEREFORE, for the foregoing reasons, the Utility Parties respectfully request that the decision below of the Eleventh Circuit be affirmed.

stantly attaching to new poles as they expand their systems, utilities would be forced periodically to trek to the FCC and the Claims Court for determinations of their statutory and constitutional entitlements for the newly taken pole space. Such a procedure is a plainly inadequate remedy in light of the relatively small amounts of money involved for any given CATV system in any particular year and would amount to a deprivation of due process.

Respectfully submitted,

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May 1986

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Nos. 85-1658 and 85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal From The United States Court Of Appeals For The Eleventh Circuit

---

MOTION TO AFFIRM

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QUESTIONS PRESENTED

Whether a Federal Communications Commission Order issued pursuant to the Pole Attachments Act, 47 U.S.C. § 224, authorizing cable television companies to occupy space on Florida Power Corporation's poles at a rate less than one-third the rate specified in existing contracts between the parties effected a taking of Florida Power's property.

Whether the Pole Attachments Act is unconstitutional insofar as it authorizes takings of property and fails to provide for the determination of just compensation required by the fifth amendment to the Constitution.

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MOTION TO AFFIRM

Pursuant to S. Ct. Rule 16.1, appellee Florida Power Corporation moves that this Court affirm the decision of the United States Court of Appeals for the Eleventh Circuit. The grounds for this motion are that the decision of

the Eleventh Circuit is correct and that the case warrants no further review by this Court.

STATEMENT

Most cable television companies have formed their distribution systems, since the advent of cable television in the 1950's, by attaching equipment to preexisting pole systems owned by telephone companies or electric power companies.[1] The cable operator usually attaches its equipment pursuant to contracts with the pole owners specifying an annual space rental rate.[2] Teleprompter Corporation and Teleprompter Southeast, Inc. ("Teleprompter"), Acton CATV, Inc., d/b/a Brookville Properties Venture and PASCO Associates Venture ("Acton") and Cox Cablevision Corp., d/b/a Highlands Cable TV ("Cox") entered into such contracts with Florida Power Corporation ("Florida Power")[3] during the 1960's and 1970's.

For many years, the cable operators sought federal intervention in the private pole attachment rate-setting process. In 1978, Congress passed the Pole Attachments Act, 47 U.S.C. § 224 (the "Act").[4] In the Act, Congress

[1] Attachments to utility poles do not represent the only method or technology for distributing cable television signals but are considered to be most economical by the cable television companies.

[2] *Continental Cablevision* v. *American Elec. Power Co.*, 715 F.2d 1115, 1116 (6th Cir. 1983).

[3] Florida Power Corporation is a wholly-owned subsidiary of Florida Progress Corporation and is affiliated with the following: Electric Fuels Corp., Talquin Corporation, Hunnicutt Equities, Progress Equities, Inc., and Progress Financial Services, Inc. This listing is included pursuant to Sup. Ct. R. 28.1.

[4] It is unnecessary to respond in detail to appellants' various allegations that cable companies were paying rates that were demonstrably unfair. The facts that there is a disparity between the rates negotiated between the parties and those set by the FCC, and that the cable companies' pre-tax profits were reduced by the cost of renting pole space in no way prove that an inherently unfair situation existed. Suffice

authorized the Federal Communications Commission ("FCC" or "Commission"), subject to preemption by state regulation, to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). Congress prescribed what is "just and reasonable" as that rate which "assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole." *Id.* at § 224(d)(1).

Congress expressly eschewed the adoption of a full-blown ratemaking scheme and instead instructed the Commission to "adopt procedures necessary and appropriate to hear and resolve complaints concerning . . . rates [for pole attachments]." 47 U.S.C. § 224(b)(1). To aid in implementing this scheme, Congress granted the Commission the power to issue cease and desist orders, pursuant to § 312(b) of Title 47. *Id.*

Teleprompter filed a complaint against Florida Power with the Common Carrier Bureau of the Commission on November 18, 1980. Acton filed a similar complaint on February 20, 1981. Prior to the filing of the complaints, Florida Power had been charging Teleprompter an annual rental rate per pole of $6.24, and Acton, $7.15. These rental rates had been negotiated by the parties and agreed to in their respective contracts. *Florida Power Corp.* v.

it to note that, during the nine years preceding the Act's enactment, while the cable companies complained to Congress that unfairly high rental fees threatened the industry's very existence, the cable television industry was able to develop and prosper. Moreover, in view of the fact that most cable companies have monopolies in their service areas, the evolution of the Act could be properly characterized as an effort by the cable antenna television monopolists to expand their profits at the expense of public utility rate payers.

FCC, 772 F.2d 1537, 1540-41 (11th Cir. 1985). Teleprompter and Acton requested the Commission to order maximum rates of \$2.23 and \$2.21 respectively, and to insert those rates into the existing contracts between the cable companies and Florida Power. *Id.* at 1541. In its responses, Florida Power objected, arguing *inter alia* that the relief requested would effect a taking of private property without just compensation, in violation of the fifth amendment.[5] *Id.*

On July 16, 1981, the Commission's Common Carrier Bureau issued a Memorandum Opinion and Order responding to the Teleprompter and Acton complaints. The Common Carrier Bureau granted the relief sought by the cable companies. *Id.* In fact, the Bureau went beyond the cable companies' recommendations, authorizing Teleprompter and Acton to occupy space on Florida Power's utility poles for the duration of their contracts and beyond, at a rate substantially lower than that proposed by the cable companies. As a result, the rate ordered was \$1.79, \$.42 lower than the rate requested by Acton and \$.44 lower than the rate requested by Teleprompter. *Id.* The Common Carrier Bureau made no mention of Florida Power's constitutional challenge under the takings clause.

Cox filed a complaint against Florida Power on November 4, 1981, and, relying on the Teleprompter-Acton order, Cox requested that the rate it could properly be charged be reduced to \$1.79. *Id.* On March 8, 1982, the Common Carrier Bureau issued a Memorandum Opinion and Order granting Cox's request for imposition of a rate of \$1.79. *Id.* The Bureau again failed to address the constitutional arguments raised by Florida Power in its response.

[5] Florida Power also challenged certain facts alleged in the Complaint, the formula relied on by the cable companies, as well as the unreasonably low rate that the cable companies requested, and the statute's retroactive application to the Teleprompter Contract, which had been in existence prior to the enactment of the Act.

On August 11, 1981, Florida Power filed an application for Commission review of the Teleprompter-Acton order pursuant to Section 1.115 of the Commission's rules (47 C.F.R. § 1.115 (1985)). A similar application was filed with respect to the initial Cox order on April 7, 1982. Florida Power argued, *inter alia*, that the Bureau's order should be reversed for violating the takings clause of the fifth amendment. In a supplemental submission, Florida Power called the Commission's attention to the recently decided case of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

On September 28, 1984, the Commission denied Florida Power's applications for review in a single order (the "Order").[6] The Commission rejected Florida Power's constitutional arguments, asserting that "A commission-ordered abrogation of a contractual pole attachment rate is inapposite to a taking under the *Loretto* doctrine which addressed a physical occupation without any compensation." Order at 6; Government's Jurisdictional Statement at 28a.

Florida Power petitioned for review of the Commission's Order by the United States Court of Appeals for the Eleventh Circuit.[7] A panel of the Eleventh Circuit vacated the Commission's Order, issuing a *per curiam* opinion that relied principally on *Loretto*. The court of appeals held that the Commission's Order had authorized a permanent physical occupation of Florida Power's private property,

[6] The Order is reprinted as Appendix B to the Jurisdictional Statement of Federal Communications Commission and United States of America ("Government's Jurisdictional Statement" or "GJS"). See GJS at 21a.

[7] Group W Cable (successor to Teleprompter), the National Cable Television Association, and Cox Cablevision Corp., appellants in this Court, intervened in support of the FCC before the Eleventh Circuit. Appellees Mississippi Power & Light Co., Arizona Public Service Co., Alabama Power Co. and Tampa Electric Co. intervened in support of Florida Power.

and that it therefore effected a taking for which just compensation was due under the fifth amendment to the United States Constitution.[8] 772 F.2d at 1544, 1546.

The panel concluded that cable company access to Florida Power's property had been authorized by the government and was in no legitimate sense "invited" by Florida Power. Even assuming that Florida Power had initially "invited" the cable companies to have access to its poles by dedicating pole space to television cables and entering into written agreements with cable companies, the court observed, "it is nonetheless clear that that invitation was made subject to and based upon certain conditions, namely the agreed upon annual per pole rate . . . . While [the cable companies] may have been invited at the outset, they certainly weren't invited at the rate imposed by the FCC." 772 F.2d at 1543.

The panel further held that what the government had authorized was a physical occupation of Florida Power's property: "In regard to the physical attachment then, *Loretto* and the instant case are virtually indistinguishable; they both involve the placement of plates, boxes, wires, bolts and screws upon the property of a reluctant owner." 772 F.2d at 1544.

Finally, the court of appeals concluded that the physical occupation of Florida Power's property authorized by the FCC Order was permanent. The reduced rates had been inserted into Florida Power's contracts with the cable companies, and so "at the very least", the court observed, Florida Power would have to suffer the cable companies'

[8] Contrary to appellants' contentions, the Eleventh Circuit's decision relied on grounds that were raised by Florida Power in its briefs filed with the Eleventh Circuit and to which the court directed its inquiry at oral argument.

presence on its property for the duration of those contracts. *Id.* Moreover, the court continued, every indication pointed toward the FCC preventing utilities from withdrawing cable access upon the expiration of existing contracts. *Id.* at 1543.

Having concluded that the FCC order effected a taking of Florida Power's property, the court turned to a consideration of whether just compensation for the taking could properly be determined by the FCC pursuant to the formula devised by Congress. Relying upon the separation of powers principles enunciated in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), and applied in several more recent cases, the court held that by authorizing the FCC to make determinations of the compensation to be provided, according to a binding formula set forth in the statute, Congress precluded any true just compensation determination. 772 F.2d at 1544-46. The court ruled the Act's standards for compensating property owners constitutionally inadequate. In the provisions of the Pole Attachments Act, Congress impinged on the judiciary's exclusive province by impermissibly restricting the range of compensation available. The court therefore held the Act unconstitutional and vacated the Order issued thereunder.

The FCC and the cable company intervenors petitioned the Eleventh Circuit for rehearing and suggested rehearing *en banc*. The petitions were denied on November 12, 1985, with no member of the Eleventh Circuit expressing interest in rehearing the case.[9]

ARGUMENT

The court of appeals applied well-established legal principles in its thorough and carefully reasoned opinion.

[9] The Order of the Eleventh Circuit denying rehearing is reprinted as Appendix F to the Government's Jurisdictional Statement. GJS at 50a.

Contrary to appellants' contentions, the Eleventh Circuit's decision creates no adverse consequences for the government's ratemaking authority; nor does it create a conflict among the circuits. The decision raises no substantial question and therefore does not warrant further review by this Court.

I. The FCC Order Authorized A Physical Occupation Of Florida Power's Property, And So Constituted A Taking Within The Meaning Of The Fifth Amendment To The United States Constitution

A. This Case Is Controlled by the Court's Decision in *Loretto* v. *Teleprompter,* Which Mandates the Conclusion that the FCC Order Effected a Taking of Florida Power's Private Property

The panel below correctly held that the takings issue in the case at bar is controlled by *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto,* this Court enunciated certain limitations on legislative interference with property rights, which are imposed by the fifth amendment. *Loretto* involved a New York statute that forbade landlords from interfering with the installation of certain cable television equipment on their rental property.

This Court held that the New York statute effected a taking of landlord Jean Loretto's property and remanded the case to the state courts for a determination of the amount of compensation due. The decision was founded upon a simple but fundamental proposition: "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." 458 U.S. 419, 426 (1982). The Court held that the "direct physical attachment of plates, boxes, wires, bolts, and screws to the building" owned by Jean Loretto constituted a physical occupation of Loretto's property. *Id.* at 438. The Court further held that Loretto was absolutely dispossessed of the right to enjoy the occupied property or to exclude the cable company from it, and thus that the

physical occupation was permanent, as distinguished from "temporary" or "intermittent".

The Eleventh Circuit properly ruled that the FCC Order forces Florida Power to endure a similar permanent, physical occupation of its property by direct cable company attachments. It is undisputed that the cable companies' cable equipment physically occupies Florida Power's property. Just as in *Loretto,* there is "a direct physical attachment of plates, boxes, wires, bolts and screws" to Florida Power's utility poles. 458 U.S. at 438.

It is equally clear that, under the FCC's Order, the physical occupation of Florida Power's property is permanent, as that term was defined in *Loretto*. The cable companies' occupation of Florida Power's utility poles is neither intermittent nor temporary; rather, it is exclusive and indefinite in duration. For the duration of the existing contracts, Florida Power has no choice but to permit the cable companies to remain on its property at the rates specified by the FCC. Moreover, the FCC has made it clear that, after the contracts expire, the utility may not discontinue cable television attachments and exclude the cable companies. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C. 2d 1585, 1589 (1978) [hereinafter cited as *Adoption of Rules*]. The Commission has routinely exercised its authority to prevent any attempts by utilities to discontinue pole attachments. 772 F.2d at 1543 and n.4. Indeed, as the Eleventh Circuit recognized, if a utility desires to exclude a cable company, for whatever reason, it is "powerless to do so." *Id.* A utility's efforts to end a cable company's intrusion, if motivated by the inadequacy of the FCC-ordered rate, are deemed "retaliatory" and are met with stay orders to prevent any such exclusion.[10] Thus the court below prop-

[10] Commission Rule 1.1403(a) requires that: "[a] utility shall provide a cable television system operator no less than 60 days written notice

erly concluded that "the extent of the occupation in the case of Florida Power not only satisfies *Loretto's* permanency requirement, but significantly exceeds it." *Id.* at 1544.[11]

B. The Appellants' Efforts to Distinguish *Loretto* Have Failed

Appellants attempt to distinguish *Loretto* only superficially, virtually conceding that unless the Court reverses or drastically narrows *Loretto*, that case dictates affirmance of the holding that the FCC Order effects a taking.

prior to (1) removal of facilities or termination of any service to those facilities, such as removal or termination arising out of a rate, term or condition of a cable television pole attachment agreement. . . ." 47 C.F.R. §1.1403(a) (1985). Upon receipt of such a notice, a cable television company may seek a "temporary stay" of the removal under section (b) of Rule 1.1403. Cable companies have invoked this rule, with great success, to prevent utilities from exercising control over their own poles.

In *Whitney Cablevision* v. *Southern Indiana Gas & Elec. Co.*, File No. PA-84-0017, FCC Mimeo No. 841 (November 16, 1984), for example, the utility ordered the cable company to remove its property because of unauthorized and unsafe attachments which breached the contract between the parties. Deciding that the cable company was reasonably likely to show that the attempted termination was motivated by the utility's wish to avoid pole attachment rate regulation, the Commission stayed the utility's efforts to remove the attachment. Similarly, in *Tele-Communications, Inc.* v. *South Carolina Elec. & Gas Co.*, File No. PA-83-0027, FCC Mimeo No. 3994 (April 19, 1985), the Commission superseded a temporary stay it had previously entered, by issuing a final order preventing a utility from terminating a pole agreement, notwithstanding the utility's reliance on numerous safety violations and unauthorized attachments by the cable operator and the utility's provision of six months' notice of termination.

[11] The government's argument that Florida Power cannot raise or sustain its claim that the attachments are permanent, under *Loretto*, without first attempting to exclude the cables, ignores the fact that this Court found permanence in *Loretto*, on a record that clearly showed that Ms. Loretto had never sought to have the Teleprompter equipment removed from her building. 458 U.S. at 443 n.2 (Blackmun, J., dissenting). GJS at 11, n.10.

As a basis for distinguishing this case from *Loretto*, the government points to the fact that the statute involved in *Loretto* "mandated access to property, while the Pole Attachments Act applies only after the utility has allowed the cable company access to its property." GJS at 9. Appellant cable companies refine the argument slightly, arguing that, unlike Ms. Loretto, Florida Power has agreed to the initial entry onto its property and that the occupation is therefore not government authorized.[12] Jurisdictional Statement of Group W Cable, Inc., National Cable Television Association, Inc., and Cox Cablevision Corporation ("Cable Companies' Jurisdictional Statement" or "CCJS") at 20. Neither version of this argument is tenable.

The Commission's action authorized the cable companies to remain on Florida Power's property at rates far lower than the contractual rates which induced Florida Power initially to allow entry. A private property owner's consent to a stranger's entry at a rate of six dollars does not imply consent to entry at a rate of two dollars. Ordering a property owner to allow continued occupation at one-third the rate the owner accepted voluntarily is no different from ordering an entirely new entry. A person who enters upon property with limited authorization and exceeds the limitations placed on the entry is no less a trespasser than one who enters upon the property with no authorization. *See Restatement (Second) of Torts,* § 168

[12] Appellant cable companies also suggest that Florida Power retains control of its property, because of provisions in its contracts that permit Florida Power to reclaim pole space if it is needed for utility wires. As is discussed above, it is unlikely that the FCC would permit Florida Power to discontinue an attachment under such a provision. Moreover, as the *Loretto* Court noted, that the property owner is left with one slight strand in the bundle of property rights—the right to exclude, on condition it uses its property in one particular and limiting manner—does not vitiate its right to compensation for the physical occupation. 458 U.S. at n.17.

(1965); *see, e.g., Sabo* v. *Reading Co.*, 244 F.2d 692, 694 (3d Cir.), *cert. denied*, 355 U.S. 847 (1957); *Burton Construction & Shipbuilding Co.* v. *Broussard*, 154 Tex. 50, 273 S.W.2d 598, 603 (1954). As the panel of the Eleventh Circuit observed, "by insisting on a significantly lower rate, the cable companies have themselves transformed their status from that of an invitee, to use their own terms, to that of an unwanted guest." 772 F.2d at 1543.[13]

The government's principal effort to distinguish *Loretto*, however, consists of a single sentence: "Perhaps most significantly, the petitioner asserting a property interest in *Loretto* was the owner of an apartment building, not a regulated utility." GJS at 9. This attempted distinction is factually flawed and also lacks legal significance. The obvious weight appellants place in this perceived distinction shows their grave misunderstanding of *Loretto*.

This Court was presented with and rejected a very similar argument in *Loretto*:

> Teleprompter notes that the law applies only to buildings used as rental property, and draws the conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation.

458 U.S. at 438-39.[14]

The rule in *Loretto* sets apart permanent physical occupations as a class of actions that warrants no further inquiry before they are determined to be takings. To carve a "utility" exception out of *Loretto* makes no sense at all. Whether the entity whose property is subject to a permanent physical occupation is a regulated utility is equally unimportant, under *Loretto*, as is the economic impact of the regulation that effects the taking and the extent to which it interferes with investment-backed expectations. 458 U.S. at 432. Regardless of the propriety of considering these factors in takings cases involving intrusions short of permanent physical occupations, *Loretto* makes clear that "a permanent physical occupation is a government action of such unique character that it is a taking without regard to other factors that a Court might ordinarily examine." *Id.* Thus, the fact that Florida Power is a provider of electric utility service and is subject to regulation as such is irrelevant. Utility companies, like New York landlords and all other businesses in our society, are subject to regulation, but their property nevertheless remains private property for purposes of the takings clause.

In *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 106 S.Ct. 903 (1986), the California Public Utilities Commission ("CPUC") raised an argument analogous to appellants', by which it attempted to convince this Court to redefine the scope of utilities' property rights and to narrow the constitutional protection accorded to utilities.

[13] Moreover, from the outset, the Commission has expressed and exercised its authority to "regulate rates" even in the absence of initial consent to entry or where the initial consent has expired or been terminated: "Even where there is currently no attachment or agreement thereof, the Commission has jurisdiction if: (1) there is communication space designated on the poles and (2) the utility has discontinued attachment in order to avoid such Commission jurisdiction." *Adoption of Rules, supra* p. 9, 68 F.C.C. 2d at 1589. In *David Bailey d/b/a Port Gibson Cable TV* v. *Mississippi Power & Light Co.*, File No. PA-83-0026, FCC Mimeo No. 36118 (September 11, 1985), the FCC demonstrated its readiness to mandate access to a utility's poles even in a case where the utility had declined to contract with the cable company for reasons that included safety, manpower limitations and other economic considerations.

[14] There, Teleprompter emphasized that Loretto was subject to extensive regulation as a landlord, and was therefore somehow not entitled to fifth amendment protection. Here, in contrast, the cable television industry is arguing that Loretto was *not* a highly regulated entity, but that Florida Power is; and therefore although Loretto's property was protected, Florida Power's is not.

The case involved a challenge to a CPUC order which required Pacific Gas & Electric Co. ("PG&E") to carry third parties' messages in the unused space in its billing envelopes. The CPUC argued that because PG&E was a regulated utility: (1) it had a lesser right to freedom from state regulation of its speech than other entities; and (2) it did not have a full constitutionally protected property interest in the unused space in its billing envelopes. 106 S. Ct. at 912. This Court rejected these arguments, noting that it had previously rejected the former notion in *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 534, n.1 (1980), and that the latter "misperceives . . . the relevant property rights". 106 S. Ct. at 912.

Equally meritless are appellants' comparable arguments in this case, in which it is urged that Florida Power's property interest in its pole space is entitled only to limited protection under the fifth amendment, because of Florida Power's status as a utility.[15] The fact that a utility company is subject to regulation does not detract from the fact that when a "regulation" authorizes a permanent physical occupation of the utility's property, the regulation constitutes a taking under *Loretto*.[16]

[15] *See Alabama Power Co.* v. *Alabama Pub. Serv. Comm'n*, 422 So. 2d 767 (Ala. 1982) (public utility property is private property within the meaning of the fifth amendment takings clause); *see also United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624 (1961).

[16] At the heart of appellants' argument is the premise that Congress can effectively override the protections of the fifth amendment, simply by a declaration that its action serves the public interest or provides a public service. CCJS at 3-4. This proposition is without merit or legal basis.

As this Court made clear in *Loretto*, a finding that a law serves a valid public purpose in no way justifies an exception to the takings clause of the fifth amendment. Having posed the question of "whether an otherwise valid regulation so frustrates property rights that compensation must be paid," the Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." 458 U.S. at 425-26.

Public utility rate regulation is not implicated by the facts before the Court. The pole attachment scheme does not deal with Florida Power in its role as a public utility rendering electric service to the public, but rather in its non-utility role as a renter of space on its property, on a contractual basis.[17] This decision will have no more significance for public utility regulation than *Loretto* had for rent control. *See* 458 U.S. at 440.

II. The Pole Attachments Act Does Not Provide For A Proper Determination Of Just Compensation For Property Taken Under Its Authority And Is Therefore Unconstitutional

A. Congress Usurped a Judicial Function by Prescribing a Binding Rule for Determining the Compensation to Be Awarded for Property Taken Which Precludes Consideration of Facts Essential to a Just Compensation Award

The fifth amendment requires the payment of just compensation to a property owner whose property has been taken. U.S. Const. amend. V. Florida Power, having suffered a permanent physical occupation of its property pursuant to the FCC's Order, is entitled to a determination of what constitutes just compensation for the property so taken and to receive whatever amount is found to be just

[17] Appellants seem to have overlooked entirely the fundamental concept of what a public utility is in their attempts to portray the Eleventh Circuit's decision as a threat to all of utility regulation. Their characterization of leased space on utility poles as a "public utility" is unwarranted. Space on utility poles is property. It is not an essential business or service of public importance in the way that the provision of electricity or water is. *See* J. Bonbright, *Principles of Public Utility Rates* 8 (1961). Nor does it involve a technology of production and transmission. *Id.* at 10. Finally, space on Florida Power's poles is not something provided to or demanded by the public at all. *See* 1 Priest, *Principles of Public Utility Regulation* 10-12 (1969).

compensation. Because the Pole Attachments Act deprives Florida Power of any opportunity to have a determination made as to what constitutes just compensation, the Eleventh Circuit properly held the statute unconstitutional.[18]

The compensation provided in the Pole Attachments Act for property taken pursuant to its terms is determined according to § 224(b) and (d) of the Act. These subsections speak in terms of assuring that a utility recovers:

> not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d).

The scope and form of the proceedings before the FCC are explicitly and implicitly limited by this binding formula. The FCC's assigned role is to award compensation within the bounds of the formula devised by Congress. Only information related to those costs identified in the formula is considered by the FCC in its resolution of complaints lodged by cable companies.

When the FCC's formula for determining "compensation" is evaluated according to the standards of the fifth

[18] Contrary to appellants' contention, the Eleventh Circuit did *not* hold that an administrative agency may never make an assessment of facts relevant to a determination of just compensation. The decision in *Florida Power* is a narrow one that addresses only the particular facts generated in the context of the Pole Attachments Act, a unique statutory and administrative scheme. 772 F.2d 1537, *passim*.

amendment, its substantive shortcomings are evident.[19] It involves a narrow cost calculation, based on certain factors selected by Congress. This formula is entirely unrelated to the traditional measures of just compensation, such as fair market value. *Kirby Forest Industries* v. *United States*, 467 U.S. 1, 10 n.14 (1984); *United States* v. *320.0 Acres of Land*, 605 F.2d 762, 781 (5th Cir. 1979).

In place of a determination of just compensation, Congress prescribed a "binding rule" which leaves the Commission no latitude to award fair market value or any other constitutionally acceptable measure as compensation. Thus the statutory formula preempts any determination under broader constitutional standards.[20]

The Eleventh Circuit relied on the well established doctrine that Congress may not prescribe a binding rule which restricts or prevents the determination of constitutionally

[19] The disparity between these Congressionally-selected cost figures and traditional just compensation measures needs hardly be elaborated. A Congressionally-enacted rule limiting recovery in the context of takings of homeowners' property to a cost-based measure would engender immediate constitutional challenges. Such a rule would deprive the homeowner of all appreciation in value of the house and make dispositive the homeowner's purchase price, together with the cost of certain improvements, while eliminating all consideration of fair market value.

[20] The government attempts, by way of an *ipse dixit*, to equate the FCC's determination of so-called "fully allocated costs" with the measure of just compensation required by the fifth amendment. GJS at 12. There is no basis for such an association, in law or in fact. The cases cited in support of this premise are completely inapposite and shed no light on the proper content or definition to be assigned to "just compensation" for a permanent physical occupation. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) is a ratemaking case, not a case involving a *per se* taking; *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 105 S.Ct. 1441 (1985) is based on the notion of due process rather than a taking claim; and *Alabama Power Co.* v. *FCC*, 773 F.2d 362 (D. C. Cir. 1985) does not decide the issue of whether the Pole Attachments Act provides just compensation as required by the fifth amendment.

adequate compensation. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893) ("It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation"); *Miller* v. *United States*, 620 F.2d 812, 837 (Ct. Cl. 1980); *American-Hawaiian Steamship Co.* v. *United States*, 124 F. Supp. 378, 381, 129 Ct. Cl. 365 (1954), *cert. denied*, 350 U.S. 863 (1955); *Hudson Navigation Co.* v. *United States*, 57 Ct. Cl. 411, 415 (1922); *cf. United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 124 n.3 (1950).

The government concedes the unconstitutionality of situations "in which the legislature has attempted to 'constitute itself the judge in its own case' by condemning property and determining the amount it must pay for it." GJS at n.15 (quoting from *Isom* v. *Mississippi Central Railroad*, 36 Miss. 300, 315 (1858)). What the government fails to note is that, in enacting the Pole Attachments Act, Congress has done precisely this. By prescribing a narrow formula to govern awards for the *per se* takings that the Act effects, Congress has constituted itself the judge in its own case. Particularly in the context of an economic fight between two competing interests, independent judicial determination of the amount awarded is essential to preserving the protection afforded by the Constitution.

As the government aptly notes, *Monongahela* established that "Congress cannot circumscribe the ultimate judicial determination of whether the compensation provided is constitutionally adequate by prescribing statutory limits on the amount to be paid." GJS at n.15. Yet it is difficult to describe in other than those very terms what Congress has done in the Pole Attachments Act. Indeed, the government acknowledges that the Act defines what compensation is adequate and prescribes statutory limits—not less than the "incremental costs" of the attachment nor more than the "fully allocated cost". See GJS at 3.

As the court in *American-Hawaiian* recognized, "it may be impracticable, from the Government's standpoint, to determine just compensation" by means of an in-depth inquiry into the facts of every case, as part of an ongoing administrative scheme. 124 F. Supp. at 383. Nevertheless, the right to a particularized "judicial determination, if a property owner is dissatisfied with the compensation determined" through such a scheme, is constitutionally required. *Id.*

At no point is an inquiry of constitutionally adequate scope possible in the determination of compensation for takings effected by the Pole Attachments Act. The Act violates the fundamental procedural due process principle that a "hearing appropriate to the nature of the case" must be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The Eleventh Circuit's conclusion that the unduly "binding" nature of the Act's formula necessarily renders it unconstitutional can hardly be doubted. Indeed, as the court below recognized in characterizing the enactment of the formula as a "usurp[ation]" of an appropriately "judicial" role, the constitutional inadequacy of the overall scope of inquiry for which the Act allows also represents a violation of the proper federal separation of powers. *Florida Power*, 772 F.2d at 1546. *See, e.g.*, *Monongahela Navigation*, 148 U.S. at 327.

B. Appellate Review of FCC Pole Attachment Orders Under the Administrative Procedure Act is Insufficient to Satisfy the Constitutional Requirement of a Judicial Determination of Just Compensation

Appellants concede that just compensation is a question reserved for judicial resolution but argue that as long as there is some judicial review of an agency determination, the Constitution's requirements are satisfied.[21] The gov-

[21] *Bauman* v. *Ross*, 167 U.S. 548 (1897) lends no support for the application of this proposition to the case before the Court. The holding

ernment points to the opportunity for judicial review of FCC orders under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"), as providing the requisite opportunity for the judiciary to determine whether the orders provide just compensation. However, because of the substantive and procedural limitations of the FCC complaint proceedings described above, there is no opportunity for effective judicial review of the FCC's compensation determinations.

As is discussed in II. A, *supra*, the formula according to which the FCC must determine the compensation for pole space taken is a rigid and exclusive one. An appellate court, reviewing an FCC order, is as "bound" by Congress's formula as is the agency itself. First, the reviewing court is limited by the factual record created before the Commission. In its effort to determine whether an order is contrary to constitutional right, pursuant to 5 U.S.C. § 706 (2)(B), the court is necessarily limited to consideration of the narrow range of costs that the Commission culls for purposes of its calculation of "fully allocated costs".

Based on such a limited record, an appellate court cannot determine any useful measure of compensation other than fully allocated costs; the court is completely foreclosed from determining what would constitute just compensation according to the traditional formulation—fair market value—or from consideration of facts that might warrant a deviation from that standard.[22]

in *Bauman* resolved a seventh amendment issue only. The language in the opinion regarding the determination of compensation by any but court-appointed and court-supervised "commissioners" is dicta.

[22] Examples of evidence that would be relevant in making a fair market value determination include various contract rates for pole rental, including the rates established in arms-length negotiations between utility companies and telephone companies, which are necessarily excluded from the Pole Attachments Act's scheme. See *United States* v. *Trout*, 386 F.2d 216, 222-23 (5th Cir. 1967); 4 Nichols, *The Law of Eminent Domain* § 12.311[1] (rev. 3d ed. 1985).

The procedural limitations of the pole attachment proceedings similarly vitiate the constitutional purposes that judicial review of an agency determination might otherwise arguably advance. The parties before the FCC are not given the opportunity to take discovery or to present much of the evidence that would be material, competent and relevant to a constitutional determination.[23] Affidavits of the parties providing proposed cost calculations, the contracts between the parties, and information supplied to the Federal Energy Regulatory Commission are the data on which the FCC relies in issuing its orders. There is no opportunity to present live witnesses and no cross-examination of the information supplied by each party. And the parties are foreclosed from offering any sort of expert testimony to assist the agency in determining what is just compensation.

Thus, even were the scope of the FCC's inquiry not unacceptably limited by the statutory formula for compensation, serious questions would remain as to the adequacy of the hearing procedures, insofar as they limit the FCC's ability to make a "reasonable, certain and adequate" provision for determining compensation. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974) (quoting *Cherokee Nation* v. *Southern Kansas Railway*, 135 U.S. 641, 659 (1890)). The inadequacy of the FCC's fact-finding procedures, compounded by the deference which appellate courts must accord the factual findings of an agency under the APA (*see, e.g., Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971)), prevents any effective judicial review of an FCC compensation determination. In essence, the Act creates an irrebuttable presumption of what will constitute just compensation.

[23] Florida Power notes that even its request for *limited* discovery in the proceedings before the Commission was denied.

The appellants argue that the Eleventh Circuit erred in holding the Act invalid without first considering whether the particular Order before the court did, in fact, provide just compensation. CCJS at 26-27. The simple answer to this, explained more fully above, is that, on the record before it, the Eleventh Circuit *could not* evaluate what constituted just compensation for the property taken by the Order; hence, the panel lacked any basis for determining whether the Order before it did or did not provide just compensation.

Moreover, even had it been possible for the reviewing court to make the determination proposed by appellants—namely whether the Order provided just compensation—such an inquiry would not have produced a different result. Given the absolute limitations imposed on the FCC by 47 U.S.C. § 224(d), circumscribing the range of pole rental rates that the FCC can order, a reviewing court would be unable, without abandoning judicial restraint, to give any effect to a finding that an Order which provided "fully allocated costs" did not provide constitutionally adequate compensation. If the court remanded the matter to the Commission, the FCC would still be bound by the terms of its statutory delegation to order a rate that did not exceed fully allocated costs. Thus, under the inquiry proposed by the appellants, the only remedy available to a reviewing court would be to declare the statute unconstitutional.

The Eleventh Circuit therefore reached the only proper result, following its review of the Act and the Order. The Order was vacated and the Act declared void because they were contrary to constitutional right. 5 U.S.C. § 706 (2)(B). Virtually every determination by the FCC under the Act effects a taking, and in every instance some measure of compensation determined by Congress is awarded to the property owner as a substitute for judicially-determined

just compensation.[24] Such a statutory scheme is unacceptable under the fifth amendment.

III. The Eleventh Circuit's Decision Is A Sensible And Correct One Which Neither Creates A Conflict Among The Circuits Nor Has Any Adverse Consequences For The Government's Authority To Fix Prices Or Regulate Rates In The Public Interest

The government attempts to cast clouds of doubt on the Eleventh Circuit's decision and to shadow it with drastic consequences in an effort to convince this Court to take this opportunity to reconsider *Loretto*. Appellants advert to a claimed conflict among the Circuits caused by this

[24] Appellant cable companies suggest that if the Act effects a taking, a Tucker Act remedy may be available to utilities and thus renders unripe any challenge to the constitutionality of the compensation provided by the statute. CCJS at 24. This suggestion lacks merit. Congress did not intend to subsidize the cable television industry at the expense of the taxpayers; it makes no sense to interpret the statute to do so.

Unlike the subsidiary provision at issue in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the compensation scheme of the Pole Attachments Act is the heart of the Act. There was no reason in *Monsanto* to doubt that Congress was dedicated to keeping the main substance of the Federal Insecticide, Fungicide and Rodenticide Act registration program in operation, even if the federal treasury was thereby exposed to some potential liability. *See Regional Rail Reorganization Act Cases*, 419 U.S. at 149, n.36.

Considerations of judicial economy and avoidance of governmental waste, inefficiency and duplication of effort militate strongly against a Tucker Act remedy as well. To infer that such jurisdiction exists would create a lengthy and wasteful trail of judicial review: the FCC would reach a determination under the Act; the circuit court of appeals would review this determination under the Administrative Procedure Act; challenges of the formula could be raised in this Court; a suit could then be filed in the Claims Court for redetermination of the constitutionally proper compensation; the Claims Court decision would be appealable to the Court of Appeals for the Federal Circuit; any issue meriting consideration could then be appealed to this Court. Such a wasteful result was recently rejected by this Court in *Lindahl* v. *Office of Personnel Management*, 105 S.Ct. 1620, 1637 (1985).

decision, CCJS at 19, and suggest that the very foundation of government rate-making authority is threatened by this decision. *Id.* at 14-15. Neither contention is true.

A. *Florida Power Corp.* v. *FCC* Does Not Conflict with any Decisions by Other Circuits

In support of their claim that the Eleventh Circuit has created a conflict among the circuits, cable company appellants describe the decision in this case as one that extends *Loretto* beyond permanent physical occupations, in contrast to those in other circuits which have not extended *Loretto*.[25] CCJS at n.37. As Florida Power has repeatedly emphasized, this case involves a permanent physical occupation of the very sort that *Loretto* entailed. This case does not extend *Loretto*; it simply applies the "permanent physical occupation" standard in a straightforward way. The cases cited by appellants are all cases involving rent control laws; thus, the courts were presented with facts that were significantly distinct from those in *Loretto*, based on which they found no "permanent physical occupations" within the meaning of *Loretto*. Appellants do not and cannot explain why the application of *Loretto* to the Pole Attachments Act should dictate the result in the very different context of rent control laws.

B. Affirmance of the Eleventh Circuit's Decision Will Have No Adverse Consequences for Governmental Rate Regulation

The cable company appellants repeatedly emphasize the supposedly dire consequences the Eleventh Circuit's decision will have upon government regulation generally, and ratemaking in particular.[26] The same concern was raised by Teleprompter and dismissed by this Court in *Loretto*

[25] The government does not contend that the Eleventh Circuit's decision has caused a conflict among the circuits.

[26] It is notable that the government has not evinced a similar concern in its jurisdictional statement.

with respect to the impact of the Court's decision on the regulation of landlord-tenant relations. 458 U.S. at 418. The cable companies' concern for the future of government regulation is unwarranted here for the same reason it was deemed unwarranted by the Court in *Loretto*. The Eleventh Circuit's decision leaves unaffected the government's authority to regulate the public uses to which private property is put, as long as such "regulation" does not authorize a permanent physical occupation of private property. *Id.*

The Eleventh Circuit's decision will have no impact whatsoever on ratemaking or price-fixing as such. Fixing the prices a property owner may charge for a given property use may diminish the value of the regulated property (*FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944)) but does not involve compelled physical occupation of the owner's property by government or others.

Nor do any of the cases cited by appellants, as examples of the type of regulation that they predict would be deemed takings, involve permanent physical occupations. Most involve a simple exercise of ratemaking authority without any physical intrusion.[27] Given the wholly different analysis applicable to permanent physical occupations, the situations covered by these cases are unaffected by the ruling of the Eleventh Circuit, which properly applied *Loretto* to a physical invasion of property.[28] The Eleventh Circuit's

[27] *E.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936).

[28] Appellant cable companies also cite a list of cases involving challenges under the APA to rates set in conjunction with interconnections among utilities. CCJS at n.24. None of these cases raises or addresses a claim under the takings clause. The crux of these cases is the sharing of power generated by the utilities. It is not at all clear how a claim of permanent physical occupation could be sustained in this factual context.

In any event, these cases are fundamentally distinct from the case

decision will have no effect upon conventional rate regulation of the sort approved in *FPC* v. *Hope Natural Gas*.

To the extent that government action goes beyond simple price-fixing or conventional regulation, and authorizes permanent physical occupation of private property, the Eleventh Circuit opinion goes no further than *Loretto* in holding that such action effects a taking *per se*. A state law or administrative order may serve important public purposes, but that is irrelevant to whether there has been a *per se* taking, 458 U.S. at 419; at the same time, the fact that a government action is deemed a taking does not lead ineluctably to the frustration of the public purposes served by the government action, but means only that private property thereby taken must be justly compensated. *Id.* at 425.

C. Summary Affirmance Is Appropriate in This Case and Will Best Protect the Constitution and the Public Interest

The Eleventh Circuit undertook a careful and reasoned analysis of the Pole Attachments Act, in light of this Court's recent interpretation and application of the takings clause of the fifth amendment. As is discussed in Parts I and II, *supra*, the decision on the merits is analytically sound: the Pole Attachments Act effects a *per se* taking of property; and it substitutes an unacceptable abbreviated administrative computation of certain costs for the judicial determination of just compensation required by the fifth amendment. In its present form, the statute cannot be given effect without violating constitutional rights.

However, the constitutional defects in the statute are not inevitable by-products of Congress's expressed purpose in enacting the law. Rather they are engendered by a confluence of different elements of the Act's structure and substance, many of which are extraneous to Congress's expressed purposes. Congress inadvertently created a mechanism for taking property in pursuit of an arguably valid purpose, and therefore made insufficient provision for constitutionally adequate compensation. Now, made aware of the constitutional implications of certain aspects of the statute, Congress can draft similar legislation, modified in any number of ways to rectify the constitutional problems, and still achieve its stated goals.

before the Court because they involve utilities in their capacities as public utilities—generating and providing electricity or telephone service for public use. For that independent reason, the analysis used in such cases is distinct from the analysis applicable to *Loretto* and this case.

While Supreme Court review plays a role of utmost importance in enforcing and interpreting the Constitution, full review by the Supreme Court in this case is not necessary and therefore should be spared. A further decision would entail principally a reiteration of what *Loretto*, *Monongahela* and subsequent decisions of this Court make clear.

The application of these cases and doctrines to the Pole Attachments Act reaches no new thresholds in constitutional law. Given the unique nature of the statute involved, the implications of the decision in this case are tightly circumscribed. No conflict among the circuits has developed or will result from affirmance of this ruling.[29] Affirmance will permit Congress to begin at once to review the structure of the Act, in light of its goals and purposes and the requirements of the fifth amendment, and to enact expeditiously any new legislation it sees fit.

[29] In the wake of the Eleventh Circuit's decision in this case, all pole attachment proceedings pending before the FCC have been held in abeyance. The issue is thus isolated in this Court.

CONCLUSION

For the foregoing reasons, appellee Florida Power respectfully requests that this Court affirm the decision of the Eleventh Circuit.

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85-1658
No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF TEXAS CABLE TV ASSOCIATION, INC., ET AL. AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Regulated public utilities charge rent to cable television operators who attach cable television facilities to utility poles. May Congress empower an administrative agency, subject to judicial review, to control those rents?

2. Is the regulation of rates which utilities may charge for use of property already dedicated to public service a "taking" under the Constitution?

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BRIEF OF TEXAS CABLE TV ASSOCIATION, INC., ET AL. AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The Texas, Virginia, Georgia, and Missouri Cable Television Associations are trade associations representing cable television operators in their respective states. Continental Cablevision, Inc.; Daniels & Associates, Inc.; Times Mirror Cable Television, Inc.; TeleCable Corporation; Tele-Communications, Inc.; United Artists Cablesystems Corporation; and United Cable Television Corporation are cable television operators providing cable service throughout the nation. Together the amici represent cable systems serving more than 12 million subscribing households. The Associations and the operators are all parties to and/or vitally interested in proceedings presently pending before the Federal Communications Commission under the statute held unconstitutional by the Court below. All of the operators presently attach cable facilities to utility poles at rates which have been established with reference to the statutory guidelines.

The Eleventh Circuit has held, *sua sponte*, that Congress and its federal agencies are constitutionally forbidden to regulate the rates which public utilities charge for attaching cable television lines to utility poles. It held, based upon an 1893 case, that only courts may set such rates. The Eleventh Circuit's archaic ruling is inconsistent with current Supreme Court precedent; imperils the cable communications market; and repudiates the long-accepted principles under which Congress and its agencies regulate the modern economy.

The amici will be vitally affected by the outcome of this case. We urge this Court to review and reverse the Eleventh Circuit decision.[1]

STATEMENT OF THE CASE

The Public Interest In Pole Attachment Regulation

Until Congress passed the Pole Attachment Act in 1978, the progress of cable television faced an intractable, nationwide obstacle. Cable operators, seeking to serve television households without violating public and municipal antipathy to duplicative pole lines, sought to rent surplus space to string cable television facilities on existing utility poles.[2] They were faced with the predatory pricing of telephone companies hostile to the independent ownership of a competitive technology.[3] With the complicity of power companies, with whom the telephone companies owned or administered virtually all of the available poles, the telephone companies drained cable operators with unjustified pole rent increases.[4] Those poles had been

[1] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this Brief. Their letters of consent have been filed with the Clerk of the Court.

[2] "Use is made of existing poles rather than newly placed poles due to the reluctance of most communities based on environmental considerations, to allow an additional, duplicate set of poles to be placed." H. R. Rep. No. 721, 95th Cong., 1st Sess. 3 (1977).

[3] Section 214 Certificates, 21 F.C.C.2d 307, 316, *modified*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.* General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971).

[4] Manatee Cablevision, Inc., 22 F.C.C.2d 841, 849 (1970), *vacated as moot*, 35 F.C.C.2d 639 (1972); TeleCable Corp., 19

set in public rights-of-way, or in easements obtained with the backing of public law, to deliver public services. Congress found that utilities, who enjoyed their monopoly positions only through government intervention, were standing in the gateway of commerce, abusing their public trust and frustrating the public interest in the development of the communications marketplace.[5] Antitrust remedies, while they existed, were slow, expensive, and therefore ineffective.[6]

FCC Pole Attachment Rent Control

Congress remedied the wrongs of the utilities with the Pole Attachment Act.[7] It charged the Federal Communications Commission ("FCC") with the duty to set "just and reasonable" rates for attachment

F.C.C.2d 574, 578-79, 587 (1969); United Tel. Co. of Pennsylvania, 40 F.C.C.2d 359, 361 (1973); Radio Hanover, Inc. v. United Utils., Inc., 273 F. Supp. 709 (M.D. Pa. 1967).

[5] The Act's sponsor explained: "These utilities, however, have responded in traditional monopolistic fashion, offering cable operators 'take it or leave it' terms. Not only does this situation hamper the expansion of cable television service, but in at least one instance, it resulted in ongoing cable service being cut off to consumers. . . . [C]onsumers now receiving cable television as well as consumers who desire access to this service in the future will benefit from this bill's attempt to protect them from the abusive monopoly power of the utilities." 123 Cong. Rec. 16694 (1977) (statement of Rep. Wirth).

[6] After 11 years of litigation, Northwestern Bell Telephone's pole attachment pricing and practices were held to violate the Sherman Act, but by then the cable operator was out of business. TV Signal Co. of Aberdeen v. AT&T Co., 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D. March 13, 1981).

[7] 47 U.S.C.A. § 224 (West Supp. 1985).

space on poles, once the space is offered by utilities.[8] The rates are to be set within statutory guidelines which assure the utility of at least cost recovery, based on avoidable costs, and at most rates as they might be calculated by a public service commission, based on fully distributed costs.[9] In practice, the FCC has established pole attachment rates on fully distributed costs which assure utilities of a reasonable rate of return. Under standard utility accounting practice, regulated utilities are guaranteed non-confiscatory rates of return on their pole investments.[10] The FCC merely defines which costs of pole plant already dedicated to public service will be recovered from cable operators. All remaining costs are recovered from ratepayers.

The Commission also permits utilities a standard contractual requirement that the cable operator purchase taller replacement poles (and continue to pay rent) whenever the utilities need to use the attachment space rented to cable operators.[11] The utilities

[8] "Federal involvement in pole attachment matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable . . . as a result of private agreement . . . ." S. Rep. No. 580, 95th Cong., 1st Sess. 15 (1977).

[9] 47 U.S.C.A. § 224(d) (West Supp. 1985).

[10] Those public service commissions which account for rents from cable television operators treat them as reductions in a utility's revenue requirement. Regardless of the amount of pole rents collected, all public service commissions are required to set required revenues from ratepayers at levels which assure a nonconfiscatory return on regulated property.

[11] Cable Television Pole Attachment Rate Formula, 56 Rad. Reg. 2d (P&F) 707, 710 (1984).

are not only fully compensated for the space rented to cable, but are provided identical replacement space if their needs increase.

Under Commission regulation, cable operators and utilities may secure swift and expert resolution of pole disputes. Unlike judicial remedies, FCC procedures do not cost the parties or the public more to process than is at stake in most of the rent disputes. The FCC also offers consistent resolution of the rent disputes which may arise in any of the 18,500 franchise areas served by cable. Now that the Commission has developed consistent methods for rate setting, it has become commonplace in the cable and utilities industries to reach statewide settlements using the FCC rate methodology. For example, the rental rates for all Bell telephone poles rented to each Texas cable operator are routinely adjusted annually under the FCC formula, in consultation with the state cable television trade association, without the need for Commission involvement. The same is done for power poles rented to cable operators in Georgia. State authorities which regulate pole rentals also rely heavily on federal example. In California, the state pole rental statute imports key elements of the FCC formula, as does New York law.[12]

Judicial Control of FCC Rate Orders

The FCC's orders are enforced only through the Justice Department in federal district court.[13] FCC orders to which utilities or cable operators object may

[12] Cal. Pub. Util. Code § 767.5 (Deerings Supp. 1985); N.Y. Pub. Serv. Law § 119-a (McKinney 1986).

[13] 47 U.S.C.A. § 401(b) (West 1962).

be appealed directly from the FCC to the U.S. Courts of Appeal, which have already proven themselves capable of rigorous analysis of the FCC's methods of calculating just and reasonable rates.[14] Any constitutional deficiency in the compensation is also subject to Tucker Act review in the U.S. Claims Court.[15] By referring these pole rental disputes for expert agency resolution in the first instance, Congress has assured the swift removal of market impediments without clogging the already backlogged courts.

SUMMARY OF ARGUMENT

In holding Congress and its administrative agencies powerless to impose administrative price controls, the Eleventh Circuit has reverted to archaic principles. Agencies have long been permitted to regulate rates for use of property affected with a public interest, subject to judicial review. By removing such regulatory authority exclusively to the courts, the Eleventh Circuit has shifted economic regulation to the already burdened courts, and undermined the foundation of utility regulation and much of the New Deal.

Such judicial activism is not constitutionally compelled. In this case, Congress regulates the rates charged by utilities for pole attachments because the utilities had abused the monopoly power given them as a public trust. All of the affected utility property—its distribution plant and the entirety of each pole—

[14] 47 U.S.C.A. § 402(b) (West 1962); Alabama Power Co. v. FCC, 773 F.2d 362 (D.C. Cir. 1985).

[15] 28 U.S.C.A. § 1491 (West Supp. 1985); Thomas v. Union Carbide, 105 S. Ct. 3325 (1985); Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

is already dedicated to public service, is included in the utility's rate base, and is guaranteed a nonconfiscatory return. The utilities are guaranteed perpetual use of the space rented to cable operators, under contracts which permit the utilities to recapture the space as needed. If, for some reason, this long-accepted scheme of rate regulation constitutes a "taking," Congress has assured just compensation. While the FCC sets the rates in the first instance, that compensation is subject to exacting judicial review and Tucker Act review for any constitutional deficiencies. The legality of comparable legislative action has been upheld by this Court, the D.C. Circuit, and the New York Court of Appeals. The Eleventh Circuit's contrary decision is an anachronism and must be reversed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Consequences of the Eleventh Circuit Decision

The Eleventh Circuit Court of Appeals has *sua sponte* held that it is constitutionally impermissible for Congress or an administrative agency to regulate pole rents.[16] The Circuit Court drew on this Court's holding in *Loretto*, which found a "taking" when a state permitted a cable operator to lay cable permanently on the property of an unwilling landlord.[17] From that narrow building, the Eleventh Circuit found a "taking" in Congress' regulation of the attachment rates

[16] Florida Power Corp. v. FCC, 772 F.2d 1537, 1545 (11th Cir. 1985).

[17] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

which heavily regulated public utilities, guaranteed a rate of return, may charge to cable television operators. Then, principally in reliance upon an 1893 case which has been repudiated by Justice Holmes and by a majority of the present Court,[18] the Eleventh Circuit held that only a court could set the compensation due the utilities.[19]

The Eleventh Circuit has made the narrow holding of *Loretto* swallow one hundred years of economic regulation. This Court has long upheld the legislature's right to subordinate property rights to the public interest in administrative price controls.[20] If agencies were powerless to set rates wherever physical occupation is deemed to occur, then the already backlogged courts would be swamped with compensation claims whenever a railroad hauls freight; or a public service commission orders power companies to interconnect facilities; or the FCC orders communications carriers to interconnect; or a legislature establishes rent control. All of these involve physical occupation of property, be it utility property or private property affected with a public interest. Yet they have all been upheld as legitimate forms of economic regulation,[21] now made suspect by the decision on appeal.

[18] The Circuit Court relied on Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), the case which was relied upon by the losing parties in the rent control case and the rail reorganization case. Brief for Defendant in error at 29, Block v. Hirsh, 256 U.S. 135 (1921) (rejected by Court at 157, relying upon Munn); Brief for Appellee, Penn Central Co. at 54, 58, Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) (rejected by Justices Brennan, Blackmun, Burger, Marshall, Powell, Rehnquist, and White at 149, relying on Tucker Act).

[19] 772 F.2d at 1545.

[20] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 395-400 (1940) (coal prices); Nebbia v. New York, 291 U.S. 502 (1934) (milk prices).

The Court's ruling will frustrate any Congressional regulation in the public interest wherever physical occupation is deemed to occur. Under the Eleventh Circuit's view, taking will become the new substantive due process, the new non-delegation doctrine—activist doctrines widely reported to be "dead in the federal courts."[22] It would shift the burden of economic regulation from Congress and its agencies to the judiciary, at a time when this Court and this Administration has called on Congress to relieve federal judges of the growing "judicial deficit" of backlogged cases.[23] Such a rebirth of "economic civil rights" has been recommended by some academics; but even they admit that the view is a radical departure from modern jurisprudence, which would re-

[21] In Gainesville Utils. Dept. v. FPC, 402 U.S. 515, 528 (1971), for example, the Court held that the FPC may order physical interconnection of power companies and that Congress may "commit judgment of what compensation is reasonably due, in this highly technical field, to the Commission." The same holding applies to communications carriers. Bell Tel. Co. of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

[22] 1 Davis, Administrative Law Treatise § 3.10, at 187 (2d ed. 1978).

[23] *See, e.g.*, Chief Justice Burger, 1985 Year-End Report on the Judiciary 3-4; J. Rose and D. Karp (Department of Justice), *Congress' Inaction to Blame for Federal Court Backlog*, Legal Times, January 23, 1984 at 14, col. 1 (encouraging greater reliance on agencies to resolve disputes with "some degree of Article III review").

peal the New Deal; and even they would not extend their activism to dismantle utility regulation.[24]

Constitutionality of Administrative Rate Regulation

The Eleventh Circuit's emasculation of Congressional power is nowhere compelled by the Constitution. The constitutionality of Congress' use of remedial rent control has long been upheld. Justice Holmes, for example, upheld state and federal rent and eviction control. "If the public interest be established," he wrote, "the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn* v. *Illinois*, 94 U.S. 113, 24 L Ed. 77." *Block* v. *Hirsh*, 256 U.S. 135, 257 (1921). On that cornerstone, the structure of modern economic regulation has been built.

Utilities have developed and enjoyed monopoly control of poles and rights-of-way solely because of government intervention. Utilities were granted the powers of eminent domain as a public use and assured the privilege of protected markets as a public trust. Congress is fully empowered, if not obligated, to prevent the utilities' abuse of that governmentally-created market power and to protect the communications marketplace. As the Court noted this Term in upholding a rent control ordinance, "the function of government may often be to tamper with free markets, correcting their failures and aiding their victims . . . ."[25] Faced with the public need for swift control

[24] R. Epstein, Takings: Private Property and the Power of Eminent Domain 274, 281 (1985).

[25] Fisher v. City of Berkeley, 106 S. Ct. 1045, 1048 (1986).

of predatory rate increases by monopoly public utilities, Congress charged the FCC with controlling pole attachment rates. We do not believe that Congress' scheme of pole attachment regulation is a "taking," anymore than is rent control, or was the control of rates charged for grain elevator space in *Munn*. This is particularly so because (1) the utilities are renting poles which are *already* dedicated to public service and embedded in the rate base, and are therefore guaranteed their authorized rates of return;[26] and (2) the utilities are never permanently displaced from use of the pole space rented to cable operators.[27]

But if some regulatory line has been crossed, and the Pole Attachment Act constitutes a "taking," there is nothing in modern law incapacitating Congress from using agencies in the first instance to set compensation, where the amount may be tested under the Tucker Act and in judicial review. In upholding the Rail Reorganization Act of 1973, for example, this Court made clear that Congress could not only take title to the properties of northeast corridor railroads, but could specify the form of compensation, and could establish an independent agency to set its amount.[28]

[26] Fifth Amendment takings claims by utilities have long been rejected where regulated rates are set at just and reasonable levels. FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944). The regulation of utility rates assures a nonconfiscatory return. *See* note 10.

[27] *Loretto* found a taking only where cable had been granted "permanent physical occupation" of property, to the exclusion of its owner. 458 U.S. at 435-36. Utilities are guaranteed the right to recover the space rented to cable if their own needs increase. *See* note 11.

[28] 419 U.S. at 149-54.

The Court rejected the railroads' constitutional demands for a court trial, holding that the Tucker Act remedy alone cured any constitutional question which might arise in the administrative proceedings.

The legality of comparable procedures in cable regulation has been assumed by respected courts. On remand from *Loretto*, the New York Court of Appeals upheld state procedures permitting administrative determination of just compensation, subject to judicial review.[29] The U.S. Court of Appeals for the District of Columbia Circuit has assumed that if the Pole Attachment Act constituted a taking, then the Commission's scheme of rate setting assures just compensation.[30] The Eleventh Circuit's ruling to the contrary is archaic.

CONCLUSION

The need for the Supreme Court to address the Eleventh Circuit's anomalous ruling can hardly be overstated. Congress has every right to protect the communications marketplace from the overreaching of regulated monopolists. Unless the Eleventh Circuit is reversed, Congress will be unable to regulate the modern economy without initiating district court action each time regulations are applied.

For these reasons, this Court should note probable jurisdiction and reverse the judgment below.

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[29] Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 153, 446 N.E.2d 428, 434, 459 N.Y.S.2d 743, 749 (1983).

[30] Alabama Power Co. v. FCC, 773 F.2d at 367 n.8.

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April 9, 1986

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Brief of Texas Cable TV Association, Inc., et al., as Amici Curiae" were properly mailed, postage prepaid, this 9th day of April, 1986, to the following:

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85-1658

No. 85-1657

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF NEW YORK STATE CABLE TELEVISION ASSOCIATION, ET AL. AS AMICI CURIAE

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QUESTIONS PRESENTED

1. May Congress empower a federal administrative agency to determine, pursuant to reasonable statutory guidelines and subject to judicial review, the compensation to be paid to a regulated utility company for the use of surplus space on its utility poles by cable television service companies?

2. Does the Pole Attachment Act of 1978, 47 U.S.C. 224, violate the Fifth Amendment to the Constitution by effecting a taking of property without providing for a constitutionally adequate determination of just compensation to paid for such taking?

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Supreme Court of the United States

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No. 85-1657

FEDERAL COMMUNICATIONS COMMISSION
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FLORIDA POWER CORPORATION, *et al.*,
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On Appeal from the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF NEW YORK STATE CABLE TELEVISION ASSOCIATION, ET AL. AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The *amici curiae* are a group of trade associations representing cable television operators in their respective states. They include the following parties: the New York Cable Television Association, the Alaska Cable Television Association, the Connecticut Cable Television Association, the Florida Cable Television Association, Inc., the Hawaii Cable Television Association, the Indiana Cable Television Association, the Kansas CATV Association, the Louisiana Cable Television Association, the Maryland-Delaware Cable TV Association,

Inc. (representing cable television operators in those two states), the Oregon Cable Communications Association, the Washington Cable Communications Association, the West Virginia Cable Television Association, the Wisconsin Cable Communications Association, and the Wyoming Cable Television Association. Some of these associations are incorporated and some are unincorporated membership associations.

This appeal arises from a decision of the United States Court of Appeals for the Eleventh Circuit (*Florida Power Corp. v. FCC*, 772 F.2d 1537 (October 8, 1985)), invalidating the federal Pole Attachment Act, which empowered the Federal Communications Commission to the regulate the rates, terms and conditions of the attachment of cable television service wires and facilities to the poles of utility companies.[1]

Some of these *amici curiae* associations represent cable television operators in states which have not exercised state-level jurisdiction over the pole attachment rates charged by utilities (such as Florida, Indiana, Kansas, Louisiana, West Virginia, Wisconsin, and Wyoming), and therefore these cable operators are directly reliant upon the Federal Communications Commission ("FCC" or "Commission") under the federal Pole Attachment Act for protection from unreasonable pole attachment charges. Others of these associations represent cable television operators in states which have exercised such state jurisdiction (such as New York, Delaware, Alaska, Connecticut, Hawaii, Maryland, Oregon, and Washington), and where the cable operators must rely upon state administrative agencies for such protection; but even in these circumstances the subject cable television companies and their associations have a vital interest in the instant case because the respective state administrative agencies have directly followed or adopted the FCC's pole attachment rate standards, or have been very substantially and clearly influenced by said standards, and because a confirmation of the lower court's ruling would

[1] Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C. § 224 (West Supp. 1985)). The Commission was authorized to regulate pole attachment arrangments under the Act only where these services are not similarly regulated by any state authority. 47 U.S.C. § 224(c).

undoubtedly put in jeopardy the jurisdictional authority of state as well as federal pole attachment regulations.

Notwithstanding their differences, each of the associations comprising this group of *amici curiae* performs an active and important function in pursuing the interests of cable television operators in its state, and particularly with respect to the subject before the Court, the establishment of utility pole attachment charges. Each represents almost every cable television company and operating cable TV system in its state, and does so in a wide variety of formal and informal contexts. Cumulatively, they represent about one thousand cable television systems with about ten million cable television subscribers.

Each of these associations, on behalf of itself and the cable television companies, systems and subscribers it represents, has a vital interest in the outcome of this appeal. Should the decision of the court below be upheld, the rates charged by utility pole owners for attachment of cable television facilities will rise dramatically and unconscionably. In some states this will result directly from the removal of the FCC as an available forum for resolving any disputes arising with the utility pole owners in the exercise of their monopoly over pole attachments, and from the absence of any alternative forum at a state level. Even in those states which exercised authority in this area, attachment rates are likely to go up sharply because of their historic reliance on the FCC standards as guidelines, and because a confirmation of the Eleventh Circuit's ruling would unavoidably put into jeopardy the authority of state administrators to continue to do what the Congress may not authorize the FCC to do. Such substantial increases in pole attachment rates could prove extremely (perhaps critically) damaging to the continued provision of cable television services.

Because of the significantly lower number of cable TV subscribers per mile of cable wire, as compared to the number of utility customers on average, and because of the relatively small contribution of pole attachment charges to the total revenues of utilities, a given dollar increase in the charge for attachment per pole results in a very substantially higher impact on the costs to cable subscribers than to the potential cost

savings to utility rate payers. Moreover, pole attachment charges represent a relatively high proportion of cable television operating costs.[2] Thus, attachment fee increases may cripple the profitability of cable services, directly resulting in substantial service rate increases to subscribers and in limitations on the improvement of service offerings and the expansion of service territories. Fears of the malicious motives of telephone utilities, which have consistently approached cable television as a rival and competitive industry, helped convince the FCC and Congress that some reasonable restriction on attachment charges was necessary. Without some such protection the very continuation of many cable television systems may be threatened.

The holding of the court below threatens more than the reasonableness of utility pole attachment arrangements. By finding that the Pole Attachment Act constituted a taking requiring just compensation under the Fifth Amendment,[3] and that Congress may not empower an administrative agency such as the FCC to determine such just compensation under a reasonable standard, even with court review available,[4] the Eleventh Circuit put in danger a wide variety of existing administrative procedures and regulatory programs at the state and federal level. Included among these is the ability of states to provide reasonable mechanisms for assuring that cable television services can be made available to the tenants of premises owned by others, which was the very subject of this Court's decision in *Loretto v. Teleprompter*,[5] relied upon by the court below.[6] The *amici curiae* associations have a strong interest in the impact which the instant appeal may have on these other areas of regulatory authority, and particularly with the regulation of service to tenants addressed in *Loretto*. If this Court's ruling in *Loretto* can now be found to forbid any state

[2] *See* the *Jurisdictional Statement* of Group W Cable, Inc., National Cable Television Association, Inc., and Cox Cablevision Corporation, appellants in this appeal, at 4.

[3] 772 F.2d 1537, at 1544.

[4] Id. at 1546.

[5] *Loretto v. Teleprompter-Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

[6] 772 F.2d at 1544.

or federally legislated regulatory programs in this area, significant harm will be done to operations of cable TV companies and the hopes of tenant residents to obtain communications services on reasonable terms.

The *amici curiae* contend that the dire results described above are not required by the Constitution or the rulings of this Court, and that the decision below is in error. These *amici* will be vitally affected by the outcome of this case. They urge this Court to review and reverse the decision of the Eleventh Circuit.[7]

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt the statement of the case provided in the *jurisdictional statement* of appellants Group W Cable, Inc., National Cable Television Association, Inc. and Cox Cablevision Corporation.

SUMMARY OF ARGUMENT

In finding that the Pole Attachment Act is in violation of the Fifth Amendment, the Eleventh Circuit has held what is not a taking to be a taking, and in doing so has undone both the supposed taking and any available control on the reasonableness of utility pole attachment charges. The court below found, wrongly and without any record or support, that in effect a new right of attachment had been granted by Congress and the FCC to cable television operators.[8] However, even though the court expressed no objection to this supposed exercise of Congressional police power, and even though the petitioner Florida Power did not argue the invalidity of such a taking, the court did not proceed to review the adequacy of the compensation which might be appropriate for such a taking under the Fifth Amendment (which was all that had been requested by petitioner), nor did it even stop at ruling that an alternative

[7] The *amici curiae* submit this Brief by consent of the parties to this appeal. Their statements of consent have been filed with the Clerk of the Court.

[8] 772 F.2d at 1543.

method for setting such compensation was required. Such a ruling is in no way required by the Constitution or the decisions of this Court and would in itself have constituted error. Rather, the court below simply struck down the subject statute entirely, thereby invalidating the very grant of right which it supposed had been created by Congress, along with any compensation questions which might have arisen from such a taking.[9]

If left unreversed, the decision below would completely obstruck the public interest goals of Congress in adopting the Act (to ensure some mechanism for reviewing the reasonableness of the rates charged for pole attachment), goals to which that court had no discernible objection. The result of that decision, unsupported in factual assumptions or legal principle, is that pole attachment charges will be left entirely unreviewable, even by the courts. If any taking had occurred, it would have arisen, supposedly, from the statute which the court below has now struck down. Thus, such a ghostly taking has been laid to rest and no coins need even be placed on the grave.

The lower court's determination was fundamentally flawed by its misunderstanding of what, if anything, had been "taken". In fact, Congress did not create some new right of pole attachment, a right to make, uninvited, a permanent physical occupation of the private property of the utility, or for a cable TV operator to unilaterally appropriate pole space or to convert some such property to its own ownership.[10] To the contrary, no

[9] Id. at 1546.

[10] "Moreover, the Commission's jurisdictional reach extends only to those entities which participate in the provision of communications space on utility poles. Thus, an electric power company which owns or controls a utility pole would be subject to FCC jurisdiction only if two preconditions are met: (1) the power company shares its pole with a telephone company, or other communications entity; and, (2) a cable television system shares the communications space on the pole with the telephone utility or other communications entity, or occupies the communications space alone. An electric power company owning or controlling a pole on which no communications space has been designated would not be subject to FCC jurisdiction. S. 1547, as reported, does not vest within a CATV system operator a right to access to a utility pole, nor does the bill, as reported, require a power company to dedicate a portion of its pole plant to communications use."
Senate Report 95-580 at 15-16 (Nov. 2, 1977) to accompany S. 1547 which became Pub.L. 95-234, 92 Stat. Vol. 2 108, 123-124.

taking was ever involved, at least not in the context of the Fifth Amendment. Rather, if anything was taken from the utilities, it was only their ability to *charge* an unreasonable, monopolistic price. Not one foot, nor even one inch, of any pole was removed from the ownership, usage or enjoyment of the utility company. If hypothetically, Congress had made such a taking, so that it could thereafter allow cable operators to rent such space directly from the government, then a Fifth Amendment question would likely arise. But, this did not happen. Neither Congress nor the FCC has mandated that any utility go into, or stay in, the business of sharing its surplus pole space. Nor has the Act even attempted to restrict the price charged for such arrangements to a level which could be argued to be in any sense confiscatory. The Act allows the pole owners to continue to reap the value of such pole space by charging reasonable rental rates.[11] In reality, this law creates nothing more than another form of rent control regulation.

If the Act effected a taking, then the court below should have considered whether that type of taking was inherently improper. But even that court did not find such a taking to be improper. In the *Loretto* decision, relied upon by the court below, this Court found that a taking had been effected, but it did not hold that the taking was in any way improper.[12] The

[11] The Act authorizes the FCC to regulate the rates, terms and conditions for pole attachments to provide that they are "*just and reasonable*", 47 U.S.C. § 224(b), (and only if no appropriate state-level regulatory mechanism exists, Id. § 224(c)). It states that, "a rate is just and reasonable if it assures a utility the recovery of not less than the additional cost of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usage space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." Id. § 224(d)(1). Or, in effect, a rate that is at least equal to the "additional" or "avoidable" costs of the utility and no greater than the "fully allocated costs". Senate Report 95-580 at 19 (Nov. 2, 1977), 92 Stat. Vol. 2 108, 127.

[12] "The Court of Appeals determined that § 828 serves the legitimate public purpose of 'rapid development of and maximum penetration by means of communication which has important educational and community aspects,' 53 N.Y.2d, at 143-144, 423 N.E.2d at 329, and thus is within the State's police power. We have no reason to question that determination." *Loretto v. Teleprompter-Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

Court found only that just compensation must be paid for that taking, but it did not invalidate the state statute at issue. If, as appellants argue in the instant appeal, the taking effected by the Pole Attachment Act is merely a taking of the utility company's ability to charge unreasonable and monopolistic prices, then the propriety and validity of the Act is all the more evident.

If this form of regulation requires the setting of just compensation in a Fifth Amendment context, then the court below should have considered the proper amount of compensation which would have satisfied the Constitutional rights of the pole owners, as well as the proper forum for setting that amount. The precedents make clear that the Constitution is satisfied if a fair and reasonable price is allowed. This is precisely what Congress has directed. If this Court confirms that Congress and its properly authorized administrative agencies may not establish such reasonable rates by regulatory action, even subject to judicial review, then the courts themselves might have to act as case-by-case ratemakers in all instances of utility rate regulation or rent control programs. Such a conclusion is unreasonable on its face and inconsistent with a long line of clear precedent.

ARGUMENT

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Eleventh Circuit's decision is inconsistent with established law on the application of the Takings Clause and the setting of just compensation

I. *Loretto v. Teleprompter* Is Inapplicable.

The Eleventh Circuit's reliance on this Court's decision in *Loretto v. Teleprompter* is entirely misplaced. In *Loretto* a state statute had expressly prohibited landlords of tenanted properties from refusing to permit the installation of cable television service to their tenants.[13] There was no question that the

[13] N.Y. Exec. Law § 828 (McKinney 1982).

intrusion would be an unwilling one from the point of view of many landlords. The need for such a requirement had been clear to the State Legislature, which recognized that many landlords would see no reason to permit cable television installation upon any terms (and some landlords would have reason to forbid such services in order to further their own competitive services).[14] This Court found that such a statute effected a taking in the Fifth Amendment context, because it resulted in an unconsented permanent physical occupation of the landlord's property.[15]

By comparison, the federal Pole Attachment Act merely attempts to regulate the existing and future pole attachment rental prices charged by utility companies which are willingly in the business of sharing their surplus pole space.[16] This is no more than a classic form of proper business regulation; it is made even less controversial because the regulated businesses are already public utilities (with controlled or controllable rates of return), because the "properties" at issue are already dedicated to the protected utility rate bases, and because the underlying property value being regulated (the scarce pole space) was created by the government as a beneficial monopoly and therefore always was subject to regulation to prevent abuse of the monopoly.[17]

[14] These legislative considerations were noted by the New York Court of Appeals in its original decision upholding the validity of the statute in question. *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 140-141, 423 N.E.2d 320, 327-328 (1981).

[15] 458 U.S. 419, 438 (1982).

[16] See footnote 10, supra.

[17] Professor Epstein discusses the special situation faced by privileged utilities in his recent study of the Takings Clause. Although he is generally critical of the failure of modern decisions to provide just compensation, he supports the theory of regulation of utilities. He notes for example,

> "Direct rate regulation is therefore understood as the tail end of a system that confers upon the regulated industry the private power of eminent domain. In one sense it closely resembles the situation already considered with workers' compensation, where the size of the quid pro quo is left to legislative discretion, with little or no constitutional scrutiny by the courts." Epstein, *Takings: Private Property and the Power of Eminent Domain*, 275 (1985).

In adopting the Pole Attachment Act Congress expressed no concern that a right of attachment was even needed.[18] In clear distinction to the statute considered in *Loretto,* Congress intended here only to regulate, not to appropriate.

In writing for the majority in *Loretto,* Justice Marshall took care to distinguish that government regulation on the use of property is not necessarily a taking requiring just compensation in the Fifth Amendment context. Citing *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), he wrote, "the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest." 458 U.S. 419, at 426. In *Loretto* this Court made clear that its holding was based on the circumstance of an unwilling permanent physical occupation. It expressly noted other instances in which even severe forms of government regulation, amounting to a complete prohibition of the affected commercial activity, were held not to be takings.[19]

The *Loretto* decision made particular reference to precedents upholding regulation of the landlord-tenant relationship, "without paying compensation for all economic injuries that such regulation entails"[20], citing among others decisions upholding rent control statutes (*Bowles v. Willingham,* 321 U.S. 503 (1944), and *Block v. Hirsh,* 256 U.S. 135 (1921)). These were distinguished from the *Loretto* facts because, "in none of these cases . . . did the government authorize the permanent occupation of the landlord's property by a third party."[21] In its summary the Court noted that its decision was "very narrow",

[18] "It has been made clear in testimony by CATV industry representatives to this committee that access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of plant." Senate Report 95-580 at 16 (Nov. 2, 1977), 92 Stat. Vol. 2 109, at 124.

[19] Citing at 458 U.S. 431, *U.S. v. Cent. Eureka Mining Co.,* 357 U.S. 155 (1958), in which certain gold mines were ordered to cease operations altogether, without compensation for lost revenues; and at note 10 at 433, and at 436, *Andrus v. Allard,* 444 U.S. 51 (1979), in which a complete ban on the commerce in eagle feathers was held not to be a taking.

[20] 458 U.S. 419, at 440.

[21] Id.

and reiterated that it did not, "question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property." (emphasis in original)[22]

In the instant case, the court below relied upon the *Loretto* decision because it found that the subject statute, the Pole Attachment Act, forced utility pole owners to allow cable television attachments.[23] This was simple error. Based on that false presumption, the court examined whether the supposed intrusion involved a "permanent physical occupation", with particular concern regarding whether the occupation was "permanent"; the court found that it was "permanent" in the context of the *Loretto* standard.[24] However, this issue of permanency has relevance only if the occupancy was forced and uninvited; a consentual attachment (even at rates which are regulated without consent) is almost by definition non-permanent.[25]

In fact, when understood to be merely another form of rent control legislation, the validity of the Pole Attachment Act is confirmed by the decision of this Court in *Loretto.* The court below rests its conclusion that the instant pole attachments are

[22] Id. at 441.

[23] 772 F.2d 1537, at 1543.

[24] Id. at 1544.

[25] Congress appears to have considered that the Act would permit FCC restriction of a utility's termination of attachment rights only in the most extreme and abusive circumstances.

> "While S. 1547, as reported, does not legislate a guarantee of access by CATV systems to utility poles, the committee recognizes that it is conceivable that a nontelephone utility which currently provides CATV pole attachment space might discontinue such provision simply in order to avoid FCC regulation. The committee believes that under S. 1547, as reported, the Commission could determine that such conduct would constitute an unjust or unreasonable practice and take appropriate action upon a finding that CATV pole attachment rights were discontinued solely to avoid jurisdiction."
>
> Senate Report 95-580 at 16 (Nov. 2, 1977), 92 Stat. Vol. 2 109, at 124.

unconsented upon too fine a distinction; it sees a lack of consent merely in the fact that the *price* of attachment was not agreeable to the utility.[26] This is hardly the type of unconsented physical intrusion addressed in the "very narrow" decision in *Loretto*.

It is also very important to consider what the *Loretto* decision did *not* hold. This Court did not find that the state statute at issue in *Loretto* was in any way an improper exercise of the State's police power.[27] It did not strike down the statute and invalidate the taking. It did not find that the amount of compensation sought by the appellant there (the current market, monopolistic, "hold-out", value of the landlord's agreement to permit entry) was the proper standard for satisfying just compensation under the Fifth Amendment.[28] And it did not hold that the State's mechanism for setting just compensation was inadequate or that such just compensation could only be set by the direct and first instance adjudication of the courts.[29] Clearly, the Eleventh Circuit's reliance on *Loretto* was inappropriate in this instance.

[26] "Assuming for the moment that Florida Power's actions can be construed as an invitation to access its poles, it is nonetheless clear that that invitation was made subject to and based upon certain conditions, namely the agreed upon annual per pole rate. . . . While they may have been invited at the outset, they certainly weren't invited at the rate imposed by the FCC. In our opinion, the cable companies' occupation of Florida Power's poles *at the rates specified by the FCC* is anything but invited." (Emphasis added) 772 F.2d 1537, at 1543.

[27] See footnote 12, supra.

[28] This Court took care to note that its ruling, "does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand." 458 U.S. 419, 441.

[29] Under the New York statute in question in *Loretto* the amount of compensation is set in the first instance by a state regulatory agency, the Commission on Cable Television, pursuant to standards it adopts by regulation. N.Y. Exec. L. § 828(1)(b) (McKinney 1982). On remand, the New York Court of Appeals reviewed the statute and found that it comported with Fifth Amendment requirements and that the setting of just compensation by the administrative agency in the first instance, subject to the judicial review

(footnote continues)

II. Congress may empower an administrative agency to determine just compensation for a Fifth Amendment taking, pursuant to reasonable standards, and subject to judicial review.

Even if, hypothetically, Congress had made a taking of utility pole space, and thus created a right of just compensation for the utility pole owners under the Fifth Amendment, nothing in the Constitution or the decisions of this Court would forbid Congress from establishing a mechanism for the determination of such just compensation in the first instance by an administrative agency, such as the FCC. Congress may also provide reasonable standards to be followed by such an agency in making its determinations of just compensation. The validity of such an arrangement is perfected by the availability of judicial review.

The determination of the Eleventh Circuit in the decision below that the setting of just compensation may only be done directly by the courts in the first instance[30] is in error and should be reversed.

The Eleventh Circuit's reliance on *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893), is both outdated and misplaced. That case addressed the *adequacy* of compensation in a Fifth Amendment context. This Court has made clear that it is inappropriate to cite that case for the conclusion that the courts are the exclusive appropriate forums for the determina-

(footnote continued)

already guaranteed under New York law, was appropriate and Constitutional. 58 N.Y.2d 143, 446 N.E.2d 428, 459 N.Y.S.2d 743 (1983). It discussed at length and expressly rejected the appellant's arguments that just compensation must be set in the first instance by the courts. "Neither the federal nor the state constitution proscribes determination of compensation for a taking by a commission rather than a court." Citing *Bauman v. Ross*, 167 U.S. 548, 593 (1897), and distinguishing and explaining *Matter of Keystone Assoc. v. Moerdler*, 19 N.Y.2d 78, 89 (1966) and *Matter of City of New York (Fifth Avenue Coach Lines)*, 18 N.Y.2d 212, 218 (1966), which confirmed only "that the Legislature may not itself fix compensation, not that it may not authorize the first instance determination of compensation by commissioners or a commission, subject to later judicial review." 58 N.Y.2d 143, at 152.

[30] 772 F.2d 1537, at 1546.

tion of just compensation. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 151 n.39 (1974).[31] The New York Court of Appeals in its decision on remand of *Loretto* addressed this specific issue in the context of that case, after acknowledging this Court's express ruling that the statute considered in that case effected a taking requiring just compensation,[32] and pointed out that the principle that such compensation could be set by a legislatively created commission was so well established that a provision of the New York Constitution which enunciated that point had been repealed in 1964 as "obsolete and superfluous".[33]

What *Monongahela Navigation* did establish was the simple principle that a legislative body may not effectively remove from the courts the ultimate residual authority to review any determination of just compensation for a Fifth Amendment taking to ensure that such compensation is adequate to satisfy Constitutional compliance.[34]

The establishment of reasonable Congressional standards to be used by an administrative agency in its determinations of just compensation does not alter the principle stated above. The judicial test still remains one of whether such standards allow the setting of just compensation as ultimately reviewed by the courts.[35]

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[31] See also, *Munn v. Illinois*, 94 U.S. 113 (1877); *Bauman v. Ross*, 167 U.S. 548, 593 (1897); and other cases cited by the appellants in this case.

[32] See note 29, supra.

[33] 58 N.Y.2d 143, 152, referring to subdivision (b) of section 7 of article I of the New York Constitution (McKinney's Cons Laws of NY, Book 2, NY Const, Art I, § 7, Historical Note).

[34] "*Monongahela* did no more than restate the general principle that the courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands." *Regional Rail Reorganization Act Cases*, 419 U.S. at 151 n.39.

[35] Although the recent Court of Claims decision relied upon by the court below, *Miller v. United States*, 620 F.2d 812 (1980), notes in passing that a just compensation determination, "is basically a question of fact" and as such exclusively a judicial function (citing *Monongahela Nav. Co. v. United States*), it immediately thereafter holds that, "the rate of interest set by a statute" [which was at issue therein] "can be applied to a claim for just compensation if such rate is reasonable and judicially acceptable." 620 F.2d at 837.

Even if no direct judicial appeal is provided (unlike here where the determinations of the FCC under the Pole Attachment Act are expressly appealable to the federal Courts of Appeals [36]) the availability of a claim under the Tucker Act [37] ensures that property owners will have some form of judicial review available to protect their rights to just compensation under the Fifth Amendment when a taking has been made by action of the federal government.[38] Where an appeal to judicial review is available, as here, no inherent violation of the Fifth Amendment is evident merely from a Congressionally created administrative mechanism for setting just compensation in the first instance.[39]

In the case of a Pole Attachment Act considered here, the availability of judicial review has been demonstrated by the very proceeding brought by the petitioner Florida Power in the Eleventh Circuit, and by similar prior appeals appropriately reviewed by the federal Courts of Appeals.[40]

III. Congress may regulate the activities of commercial enterprises without effecting a taking requiring the payment of just compensation under the Fifth Amendment.

The principle that legislative regulation of commerical activities or of the use of private property, in the proper exercise of the government's police power, is not a taking requiring the payment of just compensation under the Fifth Amendment is well established. In *Munn v. Illinois*, 94 U.S. 113 (1877), the Court confirmed the long-established principle that private property, otherwise protected from government control or removal, may become subject to regulation when the owner

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[36] 47 U.S.C. § 402(a).

[37] 28 U.S.C. § 1491 (1982).

[38] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S. Ct. 2862 (1984).

[39] *Bauman v. Ross*, supra.

[40] *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981), upholding the FCC's regulatory standards for pole attachments; *Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985), ordering certain modifications of the FCC's compensation calculations under the statutory standard; and *Texas Power & Light Co. v. FCC*, No. 84-4818 (5th Cir. March 17, 1986), in accord with *Alabama Power*.

willingly puts it to use in a manner subject to a public interest.[41] The owner's common law rights in his property can not prohibit a proper exercise of legislative power, and there (as here) this allowed for the regulation of rates for property usage by others, to allow the owner a reasonable rate but not one determined by the purely monopolistic market value controlled by the owner.[42] Since the decision in *Munn* this Court has repeatedly held various forms of regulation to be proper exercises of the police power and not violative of the Takings Clause.[43] The established test for review of the regulation of rates of a utility service is whether the limit on investment return is so severe as to be genuinely confiscatory.[44]

The Pole Attachment Act is simply another of the rate regulation programs which should be reviewed by this standard. The control imposed does not constitute an uninvited taking of property of the type addressed in *Loretto,* but only a restraint on the price charged for an otherwise invited relationship. As recently as last year the Court of Appeals for the District of Columbia considered the *Loretto* standard in detail before holding that a regulation of privately operated taxi stands in the city of Washington was not a taking because of the voluntary participation of local hotels in making such taxi stands available on their private property. *Hilton Washington Corp. v. District of Columbia,* 777 F.2d 47 (1985).

[41] "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." 94 U.S. at 126.

[42] Id. at 134.

[43] In the *Loretto* decision, relied upon the court below, this line of decision was described extensively. 458 U.S. 419, 426-441. See generally, *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[44] *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944); *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968)

The Eleventh Circuit decision in the instant case seemed to show an unexpected concern with the preexisting contract rights of the utility pole owners. But it is well established that a preexisting contractual right may be limited or modified (or even eliminated) by proper exercise of the regulatory function of Congress. *Louisville & Nashville R.R. Co. v. Mottley,* 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297 (1911).[45]

Ultimately, what is at issue in this case is not the application of the Fifth Amendment, but the question of the proper amount of the compensation which the affected utilities may charge for their cooperative sharing of pole space. For if the amount permitted is a fair and reasonable one then questions about the application of the Fifth Amendment are effectively moot.[46] The proper determination of the value of the utility's rentable pole space is not based on the monopolistic "hold-up" price which might be obtained by the utility, but a reasonable return on the investment of the utility in the regulated property.[47] The proper measure of value is the owner's loss, if any, not the taker's gain.[48] In the instant case there is no loss because the Act has guaranteed a non-confiscatory recovery ("not less than the additional cost of providing pole attachments" [49]) and the FCC's standards have ensured that the maximum fair return on investment (fully allocated costs recovery, as permitted by the Act) is recovered.[50] To determine the value of the pole usage on the basis of the market price, as the Eleventh Circuit seemed inclined to do (with reference to the pre-Act contract prices extracted by Florida Power through its monopolistic dominance) would be to validate for the first time

[45] ". . . the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made." 219 U.S. at 485.

The *Louisville & Nashville* decision is cited by the D.C. Circuit in its ruling confirming the FCC's pole attachment regulations. *Monongahela Power Co.,* 655 F.2d 1254, 1256 (D.C. Cir. 1981) (per curiam).

[46] *Alabama Power Co. v. FCC,* 773 F.2d 362, 367 n8 (D.C. Cir. 1985).

[47] *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944).

[48] *Kimball Laundry Co. v. U.S.,* 338 U.S. 1, 5 (1949).

[49] 47 U.S.C. § 224 (d).

[50] *Alabama Power Co.,* supra., at 367 n8.

the "hold-up" price as a fair basis of rate regulation or just compensation. This artificial or inflated value based on the public need has been universally rejected as a measure of compensation.[51]

Because the Congress and the FCC have adequately provided for the ability of Florida Power to obtain a reasonable return on its shared pole space, no taking has occurrred and no danger arises that just compensation will not be paid even if a taking has occurred.

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[51] *U.S. v. Cors*, 337 U.S. 325, 333-334 (1949); *McGovern v. New York*, 229 U.S. 363.

CONCLUSION

For the reasons expressed above, this Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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May 9, 1986

(6)

No. 85-1658

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Appellants,
v.
FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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May 9, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does the regulation of rates for attachments to property dedicated to public utility service constitute a "taking" under the Constitution?

2. Does the Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp.* compel the conclusion that a taking occurs when Congress empowers the FCC to determine whether rates charged cable television operators by public utilities for attachments to utility poles are just and reasonable?

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BRIEF OF AMICI CURIAE
ARIZONA CABLE TELEVISION ASSOCIATION
MID-AMERICA CABLE TELEVISION ASSOCIATION
NEW ENGLAND CABLE TELEVISION ASSOCIATION
PENNSYLVANIA CABLE TELEVISION ASSOCIATION

INTEREST OF THE AMICI CURIAE

The *amici curiae* are trade associations which represent cable operators in their respective states or regions. Cable operators in Kansas, Missouri, Nebraska and Oklahoma are represented by the Mid-America Cable Televi-

sion Association. The New England Cable Television Association represents the interests of cable operators in Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. In total, approximately 5.7 million cable subscribers are served by the cable systems represented by the *amici curiae*. The *amici curiae* are and have been parties to and/or interested in proceedings before the Federal Communications Commission (hereinafter "FCC" or "Commission") held pursuant to the statute held unconstitutional by the U.S. Court of Appeals for the Eleventh Circuit (hereinafter the "Eleventh Circuit") below.

Since cable operator members of the *amicus curiae* associations attach cable facilities to utility poles at rates established under the statutory guidelines at issue here, the *amici curiae* will be substantially affected by the outcome in this case.

Inasmuch as the Eleventh Circuit's decision, if allowed to stand, would contravene clear Supreme Court precedent, threaten the economic viability of cable communications services and disrupt the appropriate methods by which Congress regulates the economy, the *amici curiae* strongly urge the Court to review and reverse the decision of the Eleventh Circuit.[1]

STATEMENT OF THE CASE

As a matter of economic necessity and local environmental concern, cable television operators, who provide video programming to subscribers through coaxial cable or other transmission facilities, must generally attach these facilities to available space on already-existing utility poles owned by public utilities. Cable companies have, therefore, historically negotiated agreements with utility companies for the rental of space on their poles for an annual or other periodic fee. Thousands of such agreements are currently in effect across the country. Due to the superior bargaining power enjoyed by the utilities because of their local monopoly over the means of distribution of cable television's product, these agreements were often contracts of adhesion containing exorbitantly high fees. As the FCC Office of Plans and Policy stated in an August 1977 staff report, "public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates." FCC Office of Plans and Policy, Staff Report (August 1977) at 34.

Since states generally had not asserted authority over utility policies in this area,[2] cable operators sought relief from the FCC. In 1977, however, the FCC concluded that it lacked the statutory authority to assert jurisdiction over pole attachment rates.[3] Subsequently, in 1978, Congress enacted Public Law No. 95-234, 92 Stat. 33, 35-36 (approved February 21, 1978) (hereinafter "the Pole Attachments Act"), 47 U.S.C. § 224, to "resolve this jurisdictional impasse, by creating within the FCC an administrative forum for the resolution of CATV pole attachment disputes and by prompting the several States, should they wish to involve themselves in these matters, to develop their own plans free of Federal prescriptions." [4]

The Pole Attachments Act directs that, unless a state regulates such matters and provides the FCC with a certification to that effect,[5] the FCC "shall regulate the rates, terms and conditions for pole attachments to provide that such rates, terms and conditions are just and

[1] In accordance with Rule 36 of the Court, this brief is being filed with the consent of all parties to this case. Letters of consent from the parties have been filed with the Clerk of the Court.

[2] S. Rep. 95-580, 95th Cong., 1st Sess. (1977), at 14.

[3] *California Water and Tel. Co.*, 64 F.C.C.2d 753, 758 (1977).

[4] S. Rep. 95-580, *supra*, at 14.

[5] 47 U.S.C. § 224(c).

reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions."[6] The statute provides guidelines for the FCC's determination of what rate would be "just and reasonable" in a specific case.[7] In assessing a utility's costs, the FCC has the discretion to adopt any rate of return sufficient to satisfy the utility's investment-backed expectations.[8] The FCC's decision in a pole attachment matter would be subject to judicial review in the normal course.

The legislative history of the Pole Attachment Act specifically states the justification for federal involvement in pole attachment disputes:

> Federal involvement in pole attachment matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable. Thus, regardless of whether the owner or controller of the pole is an entity engaging in the provision of communications service by wire, if provision has been made for attachment of wire communications a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission.
>
> * * * *
>
> FCC regulation will occur only when a utility or CATV system invokes the powers conferred by [the Act] to hear and resolve complaints relating to the rates, terms and conditions of pole attachments. The Commission is not empowered to prescribe rates, terms and conditions for CATV pole attachments generally.[9]

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[6] 47 U.S.C. § 224(b)(1).

[7] 47 U.S.C. § 224(d).

[8] *See Alabama Power Co. v. FCC*, 773 F.2d 362, 372 (D.C. Cir. 1985).

[9] S. Rep. 95-580, *supra*, at 15.

Furthermore, it is beyond dispute that utility companies are under no obligation to make space on their poles available to cable operators:

> [The Act] does not vest within a CATV system operator a right of access to a utility pole, nor does [the Act] require a power company to dedicate a portion of its pole plant to communications use.[10]

Prior to the passage of the Pole Attachments Act, the cable television industry suffered having to lease space on utility poles at exorbitant, predatory prices.[11] Congress recognized that utilities, which enjoyed monopoly power only through a public trust, had been abusing this trust by thwarting the development of the cable communications marketplace.[12]

This case arises out of complaints filed with the FCC pursuant to the Pole Attachments Act by Teleprompter Corporation (the predecessor-in-interest to Group W Cable, Inc.) and Cox Cablevision Corporation. In each

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[10] *Id.* at 16.

[11] The abuse by the utility companies of their monopoly position and the anticompetitive efforts undertaken to stunt the growth of cable television are well documented. *See, e.g., General Telephone Co. of the Southwest v. United States*, 449 F.2d 846, 850-51 (5th Cir. 1971); *United Telephone Co. of Pennsylvania*, 40 F.C.C.2d 359, 361-68 (1973); *Better T.V. Inc. of Dutchess County, N.Y.*, 31 F.C.C.2d 939, 943-68 (1971); *TeleCable Corp.*, 19 F.C.C.2d 574, 578-91 (1969); H.R. Rep. 95-721, 95th Cong., 1st Sess. (1977), at 2-5.

[12] The Act's sponsor explained: "These utilities, however, have responded in traditional monopolistic fashion, offering cable operators 'take it or leave it' terms. Not only does this situation hamper the expansion of cable television service, but in at least one instance, it resulted in ongoing cable service being cut off to consumers . . . [C]onsumers now receiving cable television as well as consumers who desire access to this service in the future will benefit from this bill's attempt to protect them from the abusive monopoly power of the utilities." 123 Cong. Rec. 16694 (1977) (Statement of Rep. Wirth).

complaint, the cable operator argued that the contracted-for rate for pole space charged by Florida Power Corporation (hereinafter "Florida Power") exceeded the just and reasonable rate. In decisions on July 16, 1981 and March 8, 1982, the FCC determined that the just and reasonable rate for space on Florida Power's poles was, on the average, 73.8 percent below the contract rate. Florida Power's applications for review were denied by the FCC on September 28, 1984.

Florida Power appealed the FCC's ruling to the Eleventh Circuit, arguing that the FCC's rate determination deprived it of just compensation for the "taking" of its property. The Eleventh Circuit panel ruled that the Pole Attachments Act authorizes government-compelled permanent physical occupations of property, and thus effected a taking under the Fifth Amendment and this Court's decision in *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419 (1982). However, the Court of Appeals did not reach the question whether the rate set by the FCC was just and reasonable, concluding, *sua sponte*, that the determination of just compensation for a taking is "solely within the parameters of the judicial function" and may not be constitutionally delegated to the FCC. *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1545 (11th Cir. 1985). The panel thus held that the Pole Attachments Act was unconstitutional.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

If the Eleventh Circuit decision declaring the Pole Attachments Act unconstitutional is allowed to stand, the ability of the Congress to regulate public utilities in the public interest would be undermined. Furthermore, a return to monopolistic, anticompetitive rates for pole attachments would impede the growth of the cable television industry and threaten the recently-expressed desire of Congress to "assure that cable communications provide

and are encouraged to provide the widest possible diversity of information sources and services to the public." [13]

The Eleventh Circuit also is in error in extending *Loretto*'s *per se* test for takings to public utility property. The use of such property is generally subject to restriction as the *quid pro quo* for the utility's government-mandated monopoly position. The Eleventh Circuit relied on grounds which ignore long standing decisions of this Court and which are plainly distinguishable from the instant case.

I. The Regulation of Rates for Attachments to Public Utility Property Does Not Constitute a Taking Under the Constitution.

Relying on the Court's decision in *Loretto*, the Eleventh Circuit held that the FCC's order setting the rate which Florida Power could charge for attachment to its poles amounted to a taking of its property. However, that holding ignores the utility's unique status as a government-created monopoly which operates under legislative and administrative restrictions regarding its operations and its economic performance. Utility rates are almost universally set by a government agency. Utilities are guaranteed a non-confiscatory rate of return on their investment, and they do not operate as strictly private enterprises in a free market economy. Thus, the principles applicable in *Loretto* are simply inapposite here. Regulation of utility rates for pole attachments cannot be viewed the same as government-required access to wholly private property.

A. *Restrictions on the use of public utility property are commonplace.*

For over a century, it has been axiomatic that governments may regulate businesses which are "affected with

[13] 47 U.S.C.A. § 521(4) (West Supp. 1985).

a public interest." [14] As the Court in *Munn v. Illinois* stated:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.[15]

Public utility poles fall four square within this passage. This is especially so in the present context where a utility, under no compulsion to do so, makes space on its facilities available to a cable operator. The public, most particularly the cable-subscribing public, has an interest in such use, and government controls on the rates charged for such use are reasonable and consistent with a long line of cases upholding restrictions and requirements regarding the use of utility property.[16]

B. *Regulation of pole attachment rates does not result in economic loss to the utility.*

It might be possible to consider the regulation of rates for pole attachments to be a taking if an FCC-prescribed rate resulted in some economic loss to the utility. However, this is not the case. Pole attachment rate regulation does not alter the return that a utility receives on its investment in poles. Generally, if a utility chooses not to lease space on its poles to cable operators, the utility's revenue requirement will be met by its general ratepayers. Although pole attachment fees serve to offset the amount required from general ratepayers to satisfy the utility's required rate of return, the fees collected from cable operators do not alter this rate of return.[17] Utilities lease space to cable operators on poles which are already dedicated to public use and as to which they are already guaranteed an authorized rate of return. The Pole Attachments Act therefore does not deprive utilities of revenue. It simply provides a mechanism by which, in the absence of state regulation, disputes as to the just and reasonable rates for pole attachments can be fairly resolved.

The Pole Attachments Act defines a range for just and reasonable rate determinations, the low end of which ensures the payment to the utilities of their incremental costs of providing pole attachments, while the high end of the range requires payment by cable operators of a share of the fully distributed cost of the pole plant. It is thus impossible for utilities to suffer an economic loss relating to the costs involved in the cable operator's placement of cable facilities on their poles. Moreover, as a practical matter, FCC resolutions of pole attachment disputes have generally focused on fully distributed costs, with the parties claiming varying shares as just and reasonable. Therefore, cable pole attachments not only do not cause economic loss to the utility, but in fact actually serve the utility's purpose in that they lower the revenue requirement to be satisfied by general ratepayers, allowing the utility to provide service at a lower cost to its consumers.

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[14] *Munn v. Illinois*, 94 U.S. 113, 126 (1877).

[15] *Id.*

[16] Courts have on numerous occasions upheld requirements that utilities interconnect with other businesses and otherwise permit permanent physical occupation at regulated rates. *See* cases cited at note 24 of Jurisdictional Statement of Group W Cable, Inc., National Cable Television Association and Cox Cablevision Corporation in the instant case.

[17] Florida Power conceded this fact in its brief to the court below. Brief of Petitioner Florida Power Corp. before the Eleventh Circuit, at 14, 37-39 (Dec. 27, 1984).

C. ***The Pole Attachments Act is ordinary regulation with regard to public utilities and was necessary in light of demonstrated abuse by utilities in this area.***

Passage of the Pole Attachments Act was considered necessary by Congress because of the demonstrated abuse by utility companies of their monopoly status and their position as cable television's only realistic distribution alternative,[18] because the FCC had found that it lacked the statutory authority to assert jurisdiction over pole attachment fees, and because most states had not asserted regulatory authority over these matters.[19]

Since utilities enjoy their monopoly status only through government fiat, it has long been recognized in the courts that they must accept regulatory constraints in return for this unique entitlement.[20] Conferring jurisdiction upon the FCC to resolve pole attachment disputes is simply another manifestation of the *quid pro quo* which utilities must accept for the absence of competition which they enjoy. The Pole Attachments Act is thus entirely

[18] *See* H.R. Rep. 95-721, *supra*, at 2-5. *See also United Tel. Co. of Pennsylvania*, 40 F.C.C.2d 359, 361 (1973); *Manatee Cablevision. Inc.*, 22 F.C.C.2d 841, 849 (1970), *vacated as moot*, 35 F.C.C.2d 639 (1972); *Section 214 Certificates*, 21 F.C.C.2d 307, 316, *modified*, 22 F.C.C.2d 746 (1970), *aff'd sub nom. General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971); *Tele-Cable Corp.*, 19 F.C.C.2d 574, 578-79, 587 (1969); *Radio Hanover Inc. v. United States*, 273 F.Supp. 709 (M.D. Pa. 1967).

[19] Even now, over eight years after passage of the Pole Attachments Act, only 15 states and the District of Columbia have certified that they are regulating in this area. *See* FCC Public Notice, Mimeo No. 4150, dated April 29, 1986.

[20] *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (upholding order setting utility rates under Natural Gas Act of 1938); *Munn, supra*, 94 U.S. at 132 (upholding regulated rates charged for grain elevator operators who "stand . . . in the very 'gateway of commerce' and take a toll from all who pass").

consistent with the legislative function as it relates to public utilities.

D. ***The Pole Attachments Act falls short of a taking when evaluated under the Court's test for determining takings.***

The Court has consistently "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and [has] relied instead on ad hoc, factual inquiries into the circumstances of each particular case."[21] The Court has identified three factors which it said hold "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."[22]

The court below did not make an effort to analyze the Pole Attachments Act under the Court's test, instead attempting to fit the instant case into the "very narrow" holding of *Loretto*.[23] If the Eleventh Circuit had undertaken this essential task, it could not have avoided the conclusion that the Pole Attachments Act does not constitute a taking.

As discussed *supra*, it is impossible for rate regulation under the Pole Attachments Act to result in a negative economic impact on utility companies, which are guaranteed a certain authorized rate of return on investment. Even if the minimum just and reasonable compensation allowed under the Pole Attachments Act were set by the

[21] *Connolly v. Pension Benefit Guaranty Corp.*, —— U.S. ——, 106 S.Ct. 1018, 1026 (1986), *citing Ruckelshaus v. Monsanto Corp.*, 467 U.S. 986, 1005 (1984).

[22] *Id., quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). *See also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

[23] *Loretto, supra*, 419 U.S. at 441.

FCC, utility companies would still be compensated for all incremental costs of cable attachment. In actuality, the FCC generally requires cable operators to bear some share of the utility's fully distributed costs. Thus, utilities and their general ratepayers are benefited by cable attachment. Indeed, it stands to reason that utilities would not grant cable operators access to their poles in the first place if this were not so.

In view of the above, cable attachment engenders no cost to a utility company. Indeed, the pole continues to be owned by the utility; the utility can evict cable facilities if it needs the space occupied by those facilities or it can compel the cable operator to pay for a larger pole; and after cable tenancy is ended, the utility will still own the pole. Thus, regardless of the rate set by the FCC pursuant to the Pole Attachments Act, it cannot be seriously contended that regulation under the Pole Attachments Act interferes with any distinct investment-backed expectations of the utilities.

Finally, the character of the government action at issue here is not such as would compel a determination of a taking. As the Court has repeatedly stated:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, *see, e.g., United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[24]

As shown *supra*, utilities are not in any way harmed economically by cable pole attachment. Likewise, no physical rights to the use of poles are denied utilities by regulation pursuant to the Pole Attachments Act. It is therefore difficult to understand how any claim of a

[24] *Loretto, supra*, 458 U.S. at 426; *Penn Central Transportation Co. v. New York City, supra*, 438 U.S. at 124. *See also* cases cited in *Connolly v. Pension Benefit Guaranty Corporation, supra*, 106 S.Ct. at 1026.

"taking" under these circumstances can be sustained. FCC regulation pursuant to the Pole Attachments Act does not "take" the use of property away from utilities, it merely provides a method of determining a fair price for cable operators' use of utility poles. Such regulation is consistent with well established Court precedent declining to find a taking.

II. The Court's Holding In Loretto Does Not Compel the Conclusion That The Pole Attachments Act Constitutes A Taking.

A. *The Eleventh Circuit's Reliance On The Court's Holding In Loretto Is Misplaced.*

The Eleventh Circuit held below that the Pole Attachments Act amounted to a government-authorized permanent physical occupation of public utility property and that this constituted an unconstitutional taking *per se* under *Loretto*.[25] The Eleventh Circuit was wrong on both counts. The facts of the instant case are plainly distinguishable in several significant ways from those of *Loretto*.

[25] The Eleventh Circuit also held that Congress may not constitutionally delegate authority to determine just compensation for a taking to an administrative agency. This determination must, according to the Eleventh Circuit, be made by a judicial body. *Amici curiae* herein assert that no taking whatsoever occurs under the Pole Attachments Act, so that the constitutionality of the Pole Attachments Act under the Just Compensation Clause would not be at issue. If the Court disagrees, *amici curiae* strongly urge the Court to reverse the Eleventh Circuit's determination on the constitutionality of the Pole Attachments Act. The instant case concerns not private property but property already dedicated to public use. As discussed *supra*, regulation of pole attachment rates, terms and conditions falls properly within the FCC's jurisdiction over wire communications, and relates to matters about which the FCC has a particular expertise. *See Alabama Power Co. v. FCC*, 773 F.2d 362, 367 n.8 (D.C. Cir. 1985). To allow the Eleventh Circuit's decision to stand would require the federal judiciary to become the ratemaker in countless pole attachment disputes, further clogging already crowded court calendars.

1. The Pole Attachments Act does not authorize "permanent" physical occupation of utility poles.

Unlike the circumstances existing in the *Loretto* case, there is nothing permanent about the occupation of poles by cable companies. Pole space leased to a cable operator is still controlled by the utility and can be reclaimed. In applying *Loretto*, the Eleventh Circuit failed to consider that the Court had found a *per se* taking because the permanent occupation authorized under the New York law deprives the property owner of the right to possession and control:

> First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. * * * Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but he can make no nonpossessory use of the property.[26]

Utilities retain the right to compel removal of cable facilities from poles should the space be needed for the utility's primary purpose. Virtually all attachment agreements provide that a cable operator must pay the entire cost of a larger replacement pole if, at any time, there is inadequate space to accommodate the utility's needs.

2. Unlike the state law challenged in Loretto, the Pole Attachments Act does not grant cable companies any attachment rights.

The contrast between the present case and *Loretto* is heightened upon consideration of the effect of the regulations at issue upon the individual pieces of property affected. In *Loretto*, an apartment building owner was compelled to permit a cable company to attach facilities to his building. N.Y. Exec. Law § 828(1) (McKinney Supp. 1981-1982). In contrast, under the Pole Attachments Act, if a utility company does not wish to permit cable access to a particular utility pole, it is under no requirement to do so. Similarly, if access has been granted and subsequently the space occupied by cable facilities is needed by the utility, cable facilities can be expelled. If a taller pole is needed to accommodate all uses, the cable operator can be required to bear the *entire* cost of the taller pole. However, if the utility does not wish to or cannot replace the pole with a larger one, cable facilities can be excluded entirely. The regulatory scheme dictated by the Pole Attachments Act comes into play only after a utility has made an independent decision to lease a cable operator access to its property, while the New York law at issue in *Loretto* clearly precluded such an independent decision by landlords.

The Eleventh Circuit failed to weigh this key distinction in considering the "character of the government's action" under the Court's test for takings.[27] The right which appellees assert here—and which the Eleventh Circuit would grant—is the right to be free from necessary and ordinary regulation for the common good.[28]

Congress, recognizing the extortionate fees exacted by utilities while free from pole attachment rate regulation, acted to preserve the public interest by passing the Pole Attachments Act. The Act permits the FCC to review the terms of agreements voluntarily entered into by util-

[26] *Loretto, supra,* 458 U.S. at 435-36.

[27] This is not surprising since, as noted *supra*, the court below failed even to employ the balancing test for takings, instead making a broad reading of the Court's "very narrow" holding in *Loretto. Loretto, supra,* 458 U.S. at 441.

[28] It bears noting that, on remand from *Loretto*, the New York Court of Appeals directed the State Commission on Cable Television to determine just compensation for the taking involved, specifically rejecting the argument that the U.S. Constitution prohibits such a determination by an administrative agency. *Loretto v. Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 153, 446 N.E.2d 428, 459 N.Y.S.2d 743 (1983).

ity companies to ensure that they are fair to both parties. This is plainly distinguishable from the mandatory access law found to constitute a taking in *Loretto*.[29]

3. The property allegedly "taken" here is not private property, but is dedicated to public use.

The taking in *Loretto* involved the attachment of cable facilities to purely private property—an apartment building which was used by its owner as rental property. Thus, the interest of the public in the use of the subject property was not a consideration in *Loretto*.

The instant case, however, concerns ordinary regulation regarding the use of property dedicated to public use.[30] Ms Loretto's objection to undesired invasions upon her private property is precisely the concern which the Just Compensation Clause was intended to protect. This concern is substantially diluted here where regulated utilities claim that they should be free from regulation of the rates they charge to allow an additional set of wires to be strung from poles used precisely for that public purpose. The importance to this case of the nature of the property alleged to be taken cannot be overstated. Public utility plant is, by its very nature, subject to regulation and restrictions on use. Private property is far less so.[31]

[29] In addition, under the law at issue in *Loretto*, landlords would have been required to remove their buildings from the rental market in order to regain the right to exclude cable facilities. The Pole Attachments Act does not prevent utilities from excluding cable facilities from poles, or requiring payment for taller poles, when the space is needed for the utility's primary service.

[30] Courts have long held that Congress may empower regulatory agencies to exercise their rate-making function to regulate the return on public utility plant. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944).

[31] The extent to which private property *is* subject to regulation confirms that when a public interest is implicated, governments are permitted to regulate free from the constraints of the Just Compensation Clause. *See, e.g., Hilton Washington Corp. v. District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985) (upholding regulation of a hotel taxicab stand in the face of a *Loretto*-based claim because the hotel was not compelled to establish the stand).

In sum, it is clear that the Eleventh Circuit's total reliance upon *Loretto* as controlling in this case was in error.

CONCLUSION

Principles repeatedly enunciated by the Court make clear that the regulatory scheme established by Congress for reviewing pole attachment fees does not constitute a taking under the Fifth Amendment to the Constitution. It merely empowers an expert agency to arbitrate disputes regarding the fairness of pole attachment rates, and preserves for the judicial branch the power of review of that agency's determination. This scheme of government regulation is natural and ordinary. A contrary result would disrupt economic legislation by Congress and clog the nation's courts by making the judiciary the initial arbiter of pole attachment disputes.

The Court should note probable jurisdiction and reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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(9) (7)

Nos. 85-1658 and 85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,

Appellees.

GROUP W CABLE, INC.,
NATIONAL CABLE TELEVISION ASSOCIATION, INC., and
COX CABLEVISION CORPORATION,

Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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Items Reprinted in Appendix to Jurisdictional Statement of United States of America and Federal Communications Commission (hereinafter Govt.) and Appendix to Jurisdictional Statement of Group W Cable, Inc., *et al.* (hereinafter Group W):

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-3683, 84-3904

Docket Entries

10-9-84	Petition for Review of FCC Order filed in No. 84-3683
* * *	
11-29-84	Respondent FCC filed Certified List of Items in Record in No. 84-3683
12-10-84	Respondent FCC Motion to file corrected certified list filed and granted in No. 84-3683
* * *	
12-13-84	Appellant Florida Power Corp. brief filed in No. 84-3683
12-31-84	Petition for Review of FCC Order filed in No. 84-3904
1-2-85	Intervenors' Tampa Electric Co., Mississippi Power and Light Co., and Alabama Power Co. brief filed in No 84-3683
1-11-85	Record Excerpts filed in No. 84-3683
* * *	
1-30-85	Order Consolidating Nos. 84-3683 and 84-3904
* * *	

2-11-85	Certified List of Items filed in No. 84-3904
* * *	
2-19-85	Intervenors National Cable Television Ass'n, Cox Cablevision Corp., Group W Cable, Inc. brief filed
2-22-85	Appellee Brief filed
* * *	
3-7-85	Record on Appeal filed
3-8-85	Intervenors Tampa Electric Co., Mississippi Power and Light Co. and Alabama Power Co. Reply Brief filed
3-15-85	Appellant Florida Power Corp. Reply Brief filed
6-3-85	Oral Argument Scheduled
6-26-85	Case Argued Before Roney, Fay, Dumbauld, JJ.
* * *	
9-27-85	Supplemental Authority filed
10-8-85	Opinion Rendered and Judgment Entered Vacating FCC Orders
10-28-85	Petition for Rehearing and Rehearing En Banc of Group W Cable, Inc. National Cable Television Ass'n, Cox Cablevision Corp., and appellee FCC filed
11-12-85	Order denying Rehearing and Rehearing En Banc
* * *	
11-21-85	Judgment Issued as Mandate
11-22-85	Record on Appeal Returned to Clerk

12-10-85	Respondents FCC and United States Notice of Appeal to Supreme Court filed
12-10-85	Intervenors Group W Cable Inc., National Cable Television Ass'n, and Cox Cablevision Corp. Notice of Appeal to Supreme Court filed

Before the

FEDERAL COMMUNICATIONS COMMISSION

File Nos. PA-81-0008, PA-81-0023, PA-82-0005

Docket Entries

File No. PA-81-0008

11-18-80	Complaint of Teleprompter Corporation
1-21-81	Response of Florida Power Corporation
2-10-81	Reply
* * *	
7-16-81	Memorandum Opinion and Order granting complaint
8-11-81	Application for Review
8-11-81	Request for Stay, filed by Florida Power Corporation
* * *	
11-16-81	Memorandum Opinion and Order denying stay
* * *	
9-28-84	Memorandum Opinion and Order denying application for review

File No. PA-81-0023

2-20-81	Complaint of Acton CATV, Inc.
3-23-81	Response of Florida Power Corporation

4-13-81	Reply
7-16-81	Memorandum Opinion and Order granting complaint
8-11-81	Application for Review of Florida Power Corporation
8-11-81	Request for Stay
* * *	
11-16-81	Memorandum Opinion and Order denying stay
* * *	
9-28-84	Memorandum Opinion and Order denying applications for review

File No. PA-82-0005

11-2-81	Complaint of Cox Cablevision Corporation
12-2-81	Response of Florida Power Corporation
12-31-81	Reply
3-8-82	Memorandum Opinion and Order granting complaint
4-7-82	Application for Review
* * *	
9-28-84	Memorandum Opinion and Order denying review

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

File No. PA-81-0008

In the Matter of

TELEPROMPTER CORPORATION and
TELEPROMPTER SOUTHEAST, INC.

Complainants,

v.

FLORIDA POWER CORPORATION

Respondent.

TO: The Common Carrier Bureau

COMPLAINT

Parties

1. Complainants Teleprompter Corporation and Teleprompter Southeast, Inc., own and operate cable television systems presently serving the communities of DeLand, Groveland, Haines City, Mascotte, New Port Richey, St. Petersburg and Winter Garden, Florida. The address of Teleprompter Corporation's headquarters is 888 Seventh Avenue, New York, New York 10019. Teleprompter Southeast, Inc.'s address is 888 Seventh Avenue, New York, New York 10019.

2. Respondent Florida Power Corporation is engaged in the provision of electric service in portions of the State of Florida. Respondent's general office address is 3201 34th Street South, St. Petersburg, Florida 33711.

Jurisdiction

3. This Commission has jurisdiction over this complaint and over Respondent under the provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*, including, but not limited to, Section 224 thereof.

4. Respondent owns or controls utility poles in Florida. Such poles are used for purposes of wire communications. Complainants allege, upon information and belief, that Respondent is not owned by any railroad, any person who is cooperatively organized, or any person owned by the federal government or any state.

5. Complainants allege, upon information and belief, and in reliance upon lists published by the Commission pursuant of 47 C.F.R. § 1.1414(b), that neither the State of Florida, nor any of its political subdivisions, agencies, or instrumentalities, has certified to the Commission that it regulates the rates, terms, or conditions of pole attachments. The Florida Supreme Court has held that attempts by the Florida Public Service Commission to regulate pole attachments exceeded the Commission's jurisdiction. *Teleprompter Corporation v. Hawkins*, No. 56,291 (Fla., May 29, 1980).

Service

6. Attached hereto is a certificate of service on the Respondent and each federal, state, and local agency which regulates any aspect of service provided by Respondent.

Agreement

7. Complainants have entered into an agreement with Respondent by which agreement and subsequent amendments it was agreed that space would be made available on Respondent's poles in and in the vicinity of DeLand, Groveland, Haines City, Mascotte, New Port Richey, St. Petersburg, and Winter Garden, Florida. for pole attachments as defined in 47 C.F.R. § 1.1402(b). That agreement,

dated July 1, 1977, and subsequent amendments dated February 20, 1979 and June 18, 1979, are attached hereto as Exhibit A. Pursuant to the agreement, Complainants are charged an annual rental rate of $5.50 per pole for the year ending December 31, 1977, $5.74 per pole for 1978, $5.98 per pole for 1979, $6.24 per pole for 1980, $6.51 per pole for 1981, and $6.79 per pole for 1982 (Exhibit A at § 7.1). As of the close of 1979, there were 54,380 Florida poles subject to the Agreement.

Unjust and Unreasonable Rate

8. Respondent is thus currently attempting to charge Complainants an annual rental of $6.24 per pole in areas presently served. As will be demonstrated below, under the formula made applicable by Section 224(d)(1) of the Communications Act and Section 1.1409(c) of the Commission's Rules and Regulations, the maximum lawful rate Respondent may charge is $1.38.

9. In order to determine the lawfulness of Respondent's rate, Complainants requested data from Respondent justifying its rate, by letter dated June 2, 1980. Exhibit B. No response has been received.

10. By statute, the maximum lawful rate is determined by multiplying the "revenue requirement" of each pole (*i.e.*, the operating expenses and capital costs attributed to each bare pole installed) by the "use ratio" for cable television (*i.e.*, the percentage of total useable space occupied by the pole attachment).

11. Some of the information contained in publicly available documents, such as Respondent's Federal Energy Regulatory Commission ("FERC") Form 1, is sufficient to compute certain elements by which the maximum lawful rate is calculated. However, Respondent's failure to provide the information required under 47 C.F.R. §§ 1.1401-1.1415 compels Complainants to rely in part upon reasonable assumptions and upon information publicly available.

As indicated in Exhibit C, Respondent claims a gross investment in pole plant, including poles, cross arms, and all appurtenant equipment, whether or not used or useful for attachment in television cables, of $81,841,613. Subtracting a depreciation reserve of 20.3% (the ratio of the depreciation reserve for total plant to the gross investment in total plant) yields a net investment of $65,227,766. Reducing that figure to remove the 15% net investment (gross investment less depreciation reserve) in cross arms and other equipment not useful in pole attachments yields a net investment of $55,443,601. That figure must be divided by the number of poles owned by Respondent to determine net investment for bare poles. Because the total number of poles owned by Respondent is not available from public documents, and has not been disclosed by Respondent, it may be presumed that a reasonable estimate may be used. 47 C.F.R. § 1.1409(a); Second Report and Order in CC Docket 78-1404, 72 F.C.C.2d 59, 68-69 (1979); *Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia*, No. 80-372, ¶ 9 (F.C.C., July 16, 1980). Because Respondent has refused to provide a more accurate or reliable estimate of its net investment per bare pole, it may be presumed that its net investment per bare pole is no greater than its geographic neighbor, General Telephone Company of Florida, and is $57.18. Exhibit C.

12. In order to calculate the revenue requirement per pole, the net investment per pole must be multiplied by an annual carrying charge, which consists of all operating expenses and capital costs properly attributable to such poles. Both the Congress and the Commission have determined that the carrying charge is comprised of maintenance expenses, depreciation, administrative expense, taxes, and cost of capital. S. Rep. No. 95-580, 95th Cong. 1st Sess. 20 (1977); *Teleprompter of Fairmont, supra*. Based on information available in Respondent's FERC Form 1, the carrying charges attributable to maintenance

expenses, administrative expense, and taxes may be calculated as 12.4%, 1.4%, and 4.6% respectively. Exhibit C. Because Respondent has failed to provide information on its depreciation, and the rate of depreciation is not calculable from publicly available information, Complainants can only assume that Respondent's experience with its poles is comparable to that of similarly situated utilities. Assuming that the useful life of a utility pole is 30 years, then the rate of depreciation, as adjusted for application to net investment, is 4.1%. *Id.* Similarly, because Respondent has not provided information on its actual cost of capital, Complainants can only assume that Respondent's cost of capital is in the reasonable range of 10%. Thus, the annual carrying charge is approximated at 32.5%. Multiplying the net investment per bare pole, $57.18, by the annual carrying charge, 32.5%, yields a revenue requirement per pole of $18.58.

13. In order to determine what share of that revenue requirement the Respondent may charge to cable systems, it is necessary to determine two factors: the space used for cable attachments and the average useable space per pole.

14. As the Commission has found, there is no dispute that CATV cable actually uses or occupies one foot of space. *See, e.g., Teleprompter of Fairmont, supra.* No safety zones or other clearances may properly be assigned to the cable operator.

15. Respondent has failed to provide any information on its average pole height. Accordingly, Complainants may make the reasonable assumption that Respondent's pole height and average useable space is in accordance with the Commission's estimate: 13.5 feet of useable space per pole. *Id.*

16. Dividing the space occupied by the cable attachment, one foot, by the total useable space, 13.5 feet, yields a use ratio of 7.41%. In other words, Complainants use

7.41% of the useable space on each of the Respondent's poles.

17. Therefore, multiplying the revenue requirement per pole, $18.58, by the use ratio, 7.41%, yields the maximum lawful rate, $1.38. Exhibit C. Pursuant to 47 U.S.C. § 224(d)(1), that rate is the maximum just and reasonable rate. Any rate charged by Respondent in excess thereof is unjust and unreasonable and therefore unlawful.

18. As set forth above, and as reflected in the pole agreement attached as Exhibit A, Respondent presently charges a rate of $6.24. Complainants submit that such a rate is unlawful in that it exceeds the calculated maximum lawful rate of $1.38.

Anchor Attachments

19. By February 20, 1979 amendment to the agreement, Respondent is attempting to charge complainant a "one-time rental charge" of $16.50 per anchor attachment. Exhibit A. Complainants submit that this charge is unlawful. Respondent must support any such charge by the same cost justification as prescribed for pole attachments. Moreover, if anchor attachments are to be charged separately, then Respondent's investment in anchors must be removed from the net investment in poles used to calculate the maximum pole attachment charge, to avoid double counting. The pole investment figure above includes amounts invested in anchors. Should anchors be accounted for separately, the pole investment figure would be reduced by anchor investment, thereby reducing the maximum legal rate for the pole attachments.

Unreasonable Terms and Conditions

20. Respondent also has attempted to impose unreasonable and illegal terms and conditions on Complainants in Respondent's pole attachment agreement. First, the agreement requires increasing rentals annually. Attachment Agreement, Exhibit A, § 7.1. Complainants submit that no

rate increases may be permitted except when fully justified on the basis of costs under the rate-making methodology set forth in the Commission's rules. Second, the agreement requires a semiannual payment of $1,750.00 "[i]n exchange for a waiver of bond coverage for this agreement." *Id.* This payment to avoid a bonding requirement is onerous and unnecessary, because a bonding requirement is unnecessary: Complainants are established and reliable corporations. Moreover, a bond is unnecessary because the semiannual payments under the agreement must be made in advance.

Relief Requested

21. Complainants respectfully request that:

1. the Commission determine that the maximum rate Respondent may lawfully charge is $1.38 per pole per year;

2. the present rates, being in excess thereof, be terminated pursuant to 47 C.R.F. § 1.1410(a);

3. the Commission declare that Respondent's anchor attachment charge is unreasonable and unlawful unless supported by cost justification, and that if such separate charge is to be made the pole attachment charge must be reduced accordingly;

4. the Commission declare that Respondent's payment in lieu of bond requirement is unreasonable and unlawful, and that no increases in the rate above $1.38 per pole may be made unless based directly on changes in the information described in 47 C.F.R. § 1.404(g);

5. the Commission, pursuant to 47 C.F.R. § 1.1410(b), substitute an annual rate of $1.38 per pole in the agreement attached hereto as Exhibit A;

6. Respondent be ordered, pursuant to 47 C.F.R. § 1.1410(c) to refund to Complainants the amounts Complainants have paid to Respondent in excess of the maximum lawful rate for the period from the date hereof, plus interest.

Respectfully submitted,

TELEPROMPTER CORPORATION
TELEPROMPTER SOUTHEAST, INC.

By /s/ Gardner F. Gillespie
Gardner F. Gillespie

By /s/ Mark S. McConnell
Mark S. McConnell

HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Their Attorneys

Dated: November 18, 1980

AFFIDAVIT

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

I, Barry P. Simon, an officer of Teleprompter Corporation, on oath do state that I have read the foregoing Complaint attached hereto; that I am familiar with the matters contained therein and know the purpose thereof; and that the facts set forth therein are true and correct to the best of my knowledge, information, and belief.

/s/ Barry P. Simon
Barry P. Simon

Subscribed and Sworn to before me
this *4th* day of *November*, 1980

/s/ Claire Feldman [Seal]
Notary Public

My Commission Expires: March 30, 1982

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Complaint" have been mailed, postage prepaid, this 18th day of November, 1980, to the following:

Florida Power Corporation A-5
Legal Department
3201 34th Street South
St. Petersburg, Florida 33711

Florida Public Service Commission
Commission Clerk
101 East Gaines Street
Tallahassee, Florida 32301

Federal Energy Regulatory Commission
825 North Capitol Street, N.W.
Washington, D.C. 20426

/s/ Lillian R. Nelson

LIST OF EXHIBITS

EXHIBIT A

Pole Attachment Agreement and Amendments

ATTACHMENT AGREEMENT
BETWEEN
FLORIDA POWER CORPORATION
AND
TELEPROMPTER CORPORATION AND
TELEPROMPTER SOUTHEAST, INC.

Section 0.1 THIS AGREEMENT, made and entered into this 1st day of July, 1977, by and between FLORIDA POWER CORPORATION, a corporation organized and existing under the laws of the State of Florida, herein referred to as the "Electric Company", and TELEPROMPTER CORPORATION, organized and existing under the laws of the State of New York, and TELEPROMPTER SOUTHEAST, INC., organized and existing under the laws of the State of Alabama, herein collectively referred to as the "Television Company".

WITNESSETH:

Section 0.2 WHEREAS, the Television Company proposes to furnish cable television distribution service in the areas described in Schedule "I" attached hereto and made a part hereof by reference, and Television Company will need to erect and maintain aerial cables, wires and associated appliances throughout the area to be served and desires to attach such cables, wires and appliances to poles of the Electric Company; and

Section 0.3 WHEREAS, the Electric Company is willing to permit, to the extent it may lawfully do so, the attachment of said cables, wires and appliances to its existing poles where, in its judgment, such use will not interfere with its own service requirements, including consideration of economy and safety.

Section 0.4 NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties hereto mutually covenant and agree as follows:

ARTICLE I
SCOPE OF AGREEMENT

Section 1.1 The Electric Company, subject to the provisions of this agreement, grants the Television Company a license to attach CATV cables, wires and appliances to its poles. This agreement shall be in effect only in the areas described in Section 0.2 above in which the Electric Company provides electric distribution service.

Section 1.2 The Electric Company reserves the right to deny the attachment of cables, wires and appliances to its poles by the Television Company which have been installed for purposes other than or in addition to normal distribution of electric service, including, but not limited to, poles which in the judgment of the Electric Company (i) are required for the sole use of the Electric Company, (ii) would not readily lend themselves to attachments by the Television Company because of interference, hazards, or similar impediments, present or future, or (iii) have been installed primarily for the use of a third party.

Section 1.3 Pursuant to the rights provided for in the foregoing section, the Electric Company hereby excludes its poles used to support its transmission lines (lines with voltage in excess of 50 KV between conductors) and concrete poles without special written permission from the Electric Company.

ARTICLE II
PLACING, TRANSFERRING OR REARRANGING ATTACHMENTS

Section 2.1 Before making attachment to any pole or poles of the Electric Company, the Television Company shall make application and receive a permit therefor in the form of Exhibit A, attached hereto and made a part hereof.

Unless waived in writing by the Electric Company, the Television Company shall commence and complete all attachment work within the time limits set forth in Exhibit A.

Section 2.2 The Television Company shall, at its own expense, make and maintain said attachments in safe condition and in thorough repair, and in a manner suitable to the Electric Company and so as will not conflict with the use of said poles by the Electric Company, or by other utility companies using said poles, or interfere with the working use of facilities thereon or which may from time to time be placed thereon. The Television Company shall forthwith, at its own expense, upon notice from the Electric Company, remove, relocate, replace or renew its facilities placed on any pole or pole line, or transfer them to substituted poles, or perform any other work in connection with said facilities that may be required by the Electric Company; provided, however, that in cases of an emergency, the Electric Company may arrange to relocate, replace or renew facilities placed on said poles by the Television Company, transfer them to substituted poles, or perform any other work in connection with said facilities that may be required in the maintenance, replacement, removal or relocation of said poles, the facilities thereon or which may be placed thereon, or for the service needs of the Electric Company, and the Television Company shall, on demand, reimburse the Electric Company for the non-betterment expense thereby incurred. Nothing in this section shall be construed to relieve the Television Company of maintaining adequate work forces readily at hand to promptly repair, service and maintain the Television Company's facilities where such condition is hindering the Electric Company's operations.

Section 2.3 The Television Company's cables, wires and appliances, in each and every location, shall be erected and maintained in accordance with the requirements and specifications of the Electric Company and of the National

Electrical Safety Code, or any amendments or revisions of said specifications or code.

Section 2.4 In the event that any pole or poles of the Electric Company to which the Television Company desires to make attachments are inadequate to support the additional facilities in accordance with the aforesaid specifications, the Electric Company will indicate on said Exhibit A the changes necessary to provide adequate poles and estimated cost (based upon Electric Company's standard unit costs with no provision for a profit) thereof to the Television Company and return it to the Television Company; and if the Television Company still desires to make the attachments and returns the Exhibit marked to so indicate, together with an advance payment to reimburse the Electric Company for the entire estimated non-betterment portion of the cost and expense thereof, including the increased cost of larger poles, sacrificed life value of poles removed, cost of removal less any salvage recovery and the expense of transferring the Electric Company's facilities from the old to the new poles, the Electric Company will replace such inadequate poles with suitable poles. Where the Television Company's desired attachments can be accommodated on present poles of the Electric Company by rearranging the Electric Company's facilities thereon, the Television Company will compensate the Electric Company in advance for the full estimated cost (based upon Electric Company's standard unit costs with no provision for a profit) incurred in completing such rearrangements. The Television Company will also in advance reimburse the Owner or Owners of other facilities attached to said poles for any actual expense incurred by it or them in transferring or rearranging said facilities. Any strengthening of poles (guying) required to accommodate the attachments of the Television Company shall be provided by and at the expense of the Television Company and to the satisfaction of the Electric Company. The Television Company shall not set intermediate poles under or in close

proximity to the Electric Company's facilities. The Television Company may, however, request the Electric Company to set such intermediate poles as the Television Company may desire, and the Electric Company shall have the option to accept or reject such request. If such request is granted, the Television Company shall reimburse the Electric Company for the full cost (based upon Electric Company's standard unit costs with no provision for a profit) of setting such pole or poles.

Section 2.5 The Electric Company reserves to itself, its successors and assigns, the right to maintain its poles and to operate its facilities thereon in such manner as will best enable it to fulfill its own service requirements, and in accordance with the National Electrical Safety Code or any amendments or revisions of said Code and such specifications particularly applying to the Electric Company hereinbefore referred to. The Electric Company shall not be liable to the Television Company for any interruption to service of the Television Company or for interference with the operation of the cables, wires and appliances of the Television Company arising in any manner out of the use of the Electric Company's poles hereunder.

Section 2.6 The Television Company shall exercise special precautions to avoid damage to facilities of the Electric Company and of others supported on said poles, and hereby assumes all responsibility for any and all loss for such damage caused by the Television Company. The Television Company shall make an immediate report to the Electric Company of the occurrence of any damage and hereby agrees to reimburse the Electric Company for the expense incurred in making repairs. Damage to plant or facilities of the Television Company or damage to any appliance or equipment of a subscriber to the Television Company's service, arising from accidental contact with the Electric Company's energized conductors, shall be assumed by the Television Company.

ARTICLE III

EVIDENCE TO OPERATE FROM GOVERNMENT AND MUNICIPAL AUTHORITIES

Section 3.1 Notwithstanding the provisions of Section 12.1, the Television Company shall, as conditions precedent to the exercise of any rights granted by this Agreement, submit to the Electric Company: (1) certified copies of all franchises, permits, licenses or certificates of convenience and necessity granted by state and local governmental bodies authorizing the Television Company to erect and maintain its facilities within public streets, highways, and other thoroughfares located within the geographical area described in Section 0.2, and (2) a certified copy of its certificate from the Federal Communications Commission authorizing it to own and operate a cable television system in the geographical area described in Section 0.2.

ARTICLE IV

RIGHT-OF-WAY FOR TELEVISION COMPANY'S ATTACHMENTS

Section 4.1 It shall be the sole responsibility of the Television Company to obtain for itself such rights-of-way or easements as may be appropriate for the placement and maintenance of its attachments to the Electric Company's poles located on private property. While the Electric Company and the Television Company will cooperate as far as may be practicable in obtaining rights-of-way for both parties on the Electric Company's poles, no guarantee is given by the Electric Company of permission from property owners, municipalities or others for use of poles and right-of-way easement by the Television Company; and if objection is made thereto and the Television Company is unable to satisfactorily adjust the matter within a reasonable time, the Electric Company may at any time, upon thirty (30)

days' notice in writing to the Television Company, require the Television Company to remove its attachments from the poles involved and the Television Company shall, within thirty (30) days after receipt of said notice, remove its attachments from said poles and its appliances from said right-of-way easement at its sole expense. Should the Television Company fail to remove its attachments and appliances, as herein provided, the Electric Company may remove them without any liability for loss or damage, and the Television Company shall reimburse the Electric Company for the expense incurred.

ARTICLE V

INSPECTION

Section 5.1 The Electric Company, because of the importance of its service, reserves the right to inspect each new installation of the Television Company on its poles and in the vicinity of its lines or appliances and to make periodic inspections of the entire plant of the Television Company; and the Television Company, shall on demand, reimburse the Electric Company for one-half of the actual expense of such inspections. Such inspections, made or not, shall not operate to relieve the Television Company of any responsibility, obligation or liability assumed under this agreement; provided, however, that such inspections, as to payment by the Television Company to the Electric Company, shall be limited to not more than one inspection each calendar year during the period covered by the agreement.

Section 5.2 Bills for inspections, expenses and other charges under this agreement, except those advance payments specifically covered herein, shall be payable within thirty (30) days after presentation. Non-payment of bills shall constitute a default of this agreement.

ARTICLE VI

ABANDONMENT AND REMOVAL OF ATTACHMENTS

Section 6.1 The Television Company may at any time remove its attachments from any pole or poles of the Electric Company, but shall immediately give the Electric Company written notice of such removal in the form of Exhibit B, attached hereto and made a part hereof. No refund of any rental will be due on account of such removal, nor proration made for less than one-half year.

Section 6.2 Upon notice from the Electric Company to the Television Company that the use of any pole or poles is forbidden by governmental authorities or property owners, the permit covering the use of such pole or poles shall immediately terminate and then within thirty (30) days the cables, wires, and appliances of the Television Company shall be removed from the affected pole or poles. The effect of such notice shall be suspended, if the Television Company shall within thirty (30) days from the receipt thereof, commence and expeditiously prosecute a legal action to secure a legal determination of its right and authority to maintain its facilities on the affected poles. Upon final disposition of such legal action, Television Company shall remove its facilities should the judicial determination be adverse to the Television Company's right to maintain its facilities on the effected poles.

ARTICLE VII

RENTAL AND PROCEDURE FOR PAYMENTS

Section 7.1 The Television Company shall pay to the Electric Company, for attachments made to poles under this agreement, a rental at the rate of Five Dollars and Fifty Cents ($5.50) per pole per year for the period from July 1, 1977 to December 31, 1977. The annual rate per pole

shall be for the next succeeding five-year period as follows: for the year 1978 the sum of $5.74 per pole; for the year 1979 the sum of $5.98 per pole; for the year 1980 the sum of $6.24 per pole; for the year 1981 the sum of $6.51 per pole; and for the year ending December 31, 1982 the sum of $6.79 per pole. Said rentals shall be payable semiannually in advance on the first day of January and the first day of July of each year during which this agreement remains in effect. Semiannual rental payments shall be based upon the number of poles on which attachments are being maintained on the first day of June and the first day of December immediately preceding the respective due dates for semiannual payments and shall include all attachments made pursuant to prior agreement with Television Company's subsidiaries or their assignees or predecessors. The first payment of rental hereunder shall include such amount as is due for the use of poles for the period of time from the effective date hereof until the end of the calendar year in which the agreement becomes effective. In exchange for a waiver of bond coverage for this agreement, Television Company shall pay Electric Company the sum of $1,750.00 at the time each semiannual payment is due hereunder.

ARTICLE VIII

PERIODICAL REVISION OF ATTACHMENT PAYMENT RATE

Section 8.1 At the expiration of five and one-half (5 1/2) years from the date of this agreement and at the end of every three (3) year period thereafter, the rate per attachment per pole shall be subject to revision at the request of either party made in writing to the other not later than sixty (60) days before the end of any such period. If, within sixty (60) days after the receipt of such request by either party from the other, the parties hereto fail to agree upon a revision of such rate, the then adjustment rate per pole to be paid during the next three (3) year period on which the Television Company has attachments shall be (i) the current rate per pole in effect for the then current period, or (ii) an amount equal to one-half of the current annual cost of installing and maintaining a 35-foot pole, whichever amount is higher. In case of a revision of the adjustment rate as herein provided, the new rate shall be applicable until again revised.*

ARTICLE IX

DEFAULTS

Section 9.1 If the Television Company shall fail to comply with any provisions of this agreement, including the specifications hereinbefore referred to, or default in any of its obligations under this agreement and such default or non-compliance shall continue for thirty (30) days after notice thereof in writing from the Electric Company to correct such default or non-compliance, all rights of the Television Company hereunder shall be suspended, including its right to occupy the Electric Company's poles, and if such default shall continue for a period of thirty (30) days after such suspension, the Electric Company may, at its option, forthwith terminate this agreement or the permit covering the poles as to which default or non-compliance shall have occurred. In case of such termination, no refund of prepaid rentals shall be made.

ARTICLE X

LIABILITY AND INSURANCE

Section 10.1 The Television Company shall assume full responsibility for the attachment of its facilities pursuant to

*Notwithstanding the foregoing, subsequent to the expiration of the initial five and one-half (5 1/2) year period referred to above, the rate established by this agreement shall be subject to controlling governmental regulation, state or federal, if any.

this agreement and will defend and hold the Electric Company harmless against and indemnify it for any and all accidents or or damages or claims or costs whatsoever arising within the scope thereof or in carrying out this agreement, irrespective of negligence actual or claimed on the part of the Electric Company. If any member of the public, or any employee or agent of the Television Company, or any employee or agent of a contractor is injured or killed, or if any property including the Electric Company's or the public's is damaged in the course of work being performed under the provisions of this agreement, the Television Company will notify the Electric Company personnel who is inspecting the work, or in his absence, the Electric Company's supervisor who originated the contract with the Television Company. Such notification will be made immediately in person or by telephone and promptly confirmed in writing, and will include all pertinent data such as name of injured party, location of accident, description of accident, nature of injuries, names of witnesses, initial disposition of injured or deceased person.

Section 10.2 As a safeguard in respect to Section 10.1 above, the Television Company will carry Workmen's Compensation Insurance in the maximum amounts required by statute and will also carry policies of insurance acceptable to the Electric Company with respect to (a) General Liability with Bodily Injury limits not less than $200,000 each person and $500,000 each occurrence and with Property Damage limits not less than $50,000 each occurrence and $100,000 aggregate, and (b) Automobile Liability with Bodily Injury limits not less than $200,000 each person and $500,000 each occurrence and with Property Damage limits not less than $50,000 each occurrence. The Television Company will have the insurance policies mentioned in (a) and (b) above, respectively, endorsed by its insurance carrier to provide blanket contractual coverage, expressly with respect to Section 10.1 above, to the full limits of

and for the liabilities insured under said policies; and prior to the commencement of any work hereunder, the Television Company will furnish the Electric Company with a certificate, in duplicate, on the Electric Company's Form ADM-SERV-ICS-17C(S) completed by the Television Company's insurance carrier showing it carries the requisite insurance and that the specified policies insure the liability assumed by the Television Company under Section 10.1 above.

Section 10.3 The Television Company is hereby advised that the generation, transmission and/or distribution of electrical energy involves the handling of a natural force which, when uncontrolled, is inherently hazardous to life and property. The Television Company if [*sic*] further hereby advised that, due to the nature of the work to be performed hereunder, other hazardous or dangerous conditions (not necessarily related to the inherent danger of electricity) may also be involved in the work. Accordingly, prior to the commencement of the attachment of any cable television facilities to the poles of the Electric Company, the Television Company shall inspect the job site specifically to ascertain the actual and potential existence and extent of any hazardous or dangerous conditions, and instruct its employees with respect to said conditions and safety measures to be taken in connection therewith; and, during the course of the work, the Television Company shall take all such measures as may be deemed necessary or advisable to protect and safeguard the person and property of its employees of the general public against all hazardous or dangerous conditions as the same arise.

Section 10.4 The Television Company and its duly authorized agents and employees shall, before climbing poles or structures, make certain that they are strong enough to safely sustain workmen's weight in the performance of the required work on the poles or structures. All work designated in any Application and Permit under this agreement to be performed near energized electrical conductors

shall be performed under the conditions and at the place as stated, but only with the specific understanding that if the Television Company in its sole discretion regards the place where such work is to be performed, or where such work is being performed, as an unsafe place of work, either because the said conductors or other equipment are so energized, or because it is deemed unsafe for any other reason or condition or conditions then and there existing, it shall request the Electric Company for a clearance to de-energize the said conductors or other equipment, or to make such other change or changes as may be necessary or desirable in the Television Company's sole discretion, to render the place of performance at the job site a safe place to work for the Television Company's employees. In the absence of any request by the Television Company to the Electric Company it shall be conclusively presumed that the place where the work is to be performed is a safe place to work without the de-energization of such conductors or other equipment, and without making any changes whatsoever at the job site.

ARTICLE XI
EXISTING RIGHTS OF OTHER PARTIES

Section 11.1 Nothing herein contained shall be construed to confer on the Television Company an exclusive right to make attachments to the Electric Company's poles in the area covered by this agreement -and any supplement thereto, and it is expressly understood that the Electric Company has the unconditional right to permit any other person, firm or corporation to make attachments to the same poles in that area covered in this agreement and supplements thereto.

ARTICLE XII
TERM OF AGREEMENT

Section 12.1 This agreement shall become effective upon its execution and if not terminated in accordance with the pro-

visions with the provisions [*sic*] of Section 9.1 shall continue in effect from a term of not less than five and one-half (5 1/2) years. Either party may terminate the agreement at the end of said period at any time thereafter by giving to the other party at least six (6) months' written notice. Upon termination of the agreement in accordance with any of its terms, the Television Company shall immediately remove its cables, wires and appliances from all poles of the Electric Company. If not so removed, the Electric Company shall have the right to remove them at the cost and expense of the Television Company and without any liability therefor. The Electric Company shall deliver to the Television Company any equipment so removed upon termination of this agreement, upon payment of the cost of removal, cost of storage and delivery, and all other amounts then due the Electric Company.

ARTICLE XIII

ASSIGNMENT OF RIGHTS

Section 13.1 The Television Company shall not assign, transfer or sublet the privileges hereby granted without the prior consent in writing of the Electric Company.

Section 13.2 No use, however extended, of the Electric Company's poles, under this agreement, shall create or vest in the Television Company any ownership or property rights in said poles, but the Television Company's rights therein shall be and remain a conditional license. Nothing herein contained shall be construed to compel the Electric Company to maintain any of said poles for a period longer than demanded by its own service requirements. The Electric Company reserves the right, which right is limited specifically to those circumstances set forth in this agreement and including those described in Sections 0.3 and 1.2, to deny licensing of any poles to the Television Company.

ARTICLE XIV

WAIVER OF TERMS OR CONDITIONS

Section 14.1 Failure to enforce or insist upon compliance with any of the terms or conditions of this agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

ARTICLE XV

BONDING TO ELECTRIC COMPANY GROUND

Section 15.1 For the purpose of this article, the following terms when used herein shall have the following meaning, to wit:

15.1.1 "Verticle [*sic*] ground wire" shall mean a wire conductor of the Electric Company attached vertically to the pole and extended from the Electric Company's multi-grounded neutral (defined below) through the Television Company's space to the base of the pole where it may be either butt wrapped on the pole or attached to a grounded electrode.

15.1.2 "Multi-grounded neutral" shall mean an Electric Company conductor located in the Electric Company's space which is bonded to all Electric Company vertical ground wires.

15.1.3 "Bonding Wire" shall mean a number 6 AWG copper wire conductor connecting equipment of the Television Company and the Electric Company to the vertical ground wire.

Section 15.2 At the time the Television Company cable is installed, the Television Company shall install a "bonding wire" on every pole where a "vertical ground wire" exists.

Any piece of television equipment attached to an Electric Company pole which does not have a "vertical ground wire" shall be bonded to the television cable messenger.

Section 15.3 Under no condition will the Electric Company's vertical ground wire be broken, cut, severed, or otherwise damaged by the Television Company.

Section 15.4 The Electric Company reserves the right to install a "bonding wire" to any piece of television equipment where, in the opinion of the Electric Company, a safety hazard exists or may exist in the future.

Section 15.5 It shall be the responsibility of the Television Company to instruct its personnel working on the Electric Company's poles of the dangers involved in bonding its wires to the Electric Company's "vertical ground wire" and associated dangers thereof, and to furnish adequate protective equipment so as to save its personnel from bodily harm. As stated in Article X above, the Electric Company assumes no responsibility either for instructing, for furnishing equipment to, or for the liability involved in the Television Company's personnel working on the Electric Company's poles.

ARTICLE XVI

AUTOMATIC TERMINATION

Section 16.1 In the event the Television Company shall suffer, in a portion of the area described in Section 0.2 of this agreement, the expiration, suspension, cancellation or termination of any franchise, license, permit or certificate of convenience and necessity that the Television Company is required by law to obtain and maintain in full force and effect, then this agreement may, at the option of the Electric Company, upon written notice, be terminated with respect to such affected areas. The effect of such notice shall be suspended, if the Television Company shall within thirty (30) days from the receipt thereof, com-

mence and expeditiously prosecute a legal action to secure a legal determination of its right and authority to maintain its facilities on the effected poles. Upon final disposition of such legal action, Television Company shall remove its facilities should the judicial determination be adverse to the Television Company's right to maintain its facilities on the effected poles.

ARTICLE XVII

REPRESENTATIONS AND WARRANTIES

Section 17.1 Television Company represents and warrants that with respect to the area described in Section 0.2 of this agreement, Teleprompter Corporation or Teleprompter Southeast, Inc. now holds all current franchises which were previously held by various subsidiaries of Teleprompter, Inc. In the event that such is not the case, Television Company shall cause any subsidiary holding a franchise within the area described in Section 0.2 to execute and be bound by the terms of this agreement.

ARTICLE XVIII

MISCELLANEOUS PROVISIONS

Section 18.1 Attorney's Fees. In the event of any litigation between the parties hereto brought to enforce rights granted by this agreement, the prevailing party therein shall be allowed all reasonable attorney's fees expended or incurred in such litigation, in trial and appellate courts, to be recovered as a part of the costs therein.

Section 18.2 Venue of Actions. Any and all litigation between the parties hereto arising out of this agreement shall be instituted and maintained in the Circuit Courts for Pinellas County, Florida, with the exception of any cause of action arising by virtue of the laws of the United States,

which litigation shall be instituted in the United States District Court, Middle District, Tampa Division.

Section 18.3 Time. Time is of the essence of this agreement.

Section 18.4 Controlling Law. This agreement shall be construed and enforced in accordance with the laws of the State of Florida.

Section 18.5 Binding Effect. Subject to the provisions of Section 13.1 hereof, this agreement shall extend to and bind the successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate, and their corporate seals to be affixed thereto, by their respective officers thereunto duly authorized to become effective as of the day, month and year first above written.

(corporate seal)	FLORIDA POWER CORPORATION
Attest: /s/ Betty M. Clayton Secretary	By /s/ Ned B. Sparke Secretary
(corporate seal)	TELEPROMPTER CORPORATION
Attest: /s/ Barry P. Harmon Ass't. Secretary	By /s/ Richard M. Sykes Secretary
(corporate seal)	TELEPROMPTER SOUTHEAST, INC.
Attest: /s/ Barry P. Hamon Secretary	By /s/ Richard M. Sykes

EXHIBIT A

ATTACHMENT RENTAL CONTRACT

AND
FLORIDA POWER CORPORATION
Application and Permit

________, 19____

____

In accordance with the terms of agreement dated ____, 19____, application is hereby made for permit to make attachments to Florida Power Corporation poles for installation of cable television facilities as indicated on the attached construction detail drawing/s number/s ______. Certified copies of approved construction permits, as may be required by local governmental authority for the facilities indicated on the drawing/s, are attached also. Construction work, as provided for under this "Application and Permit", shall commence within thirty (30) days and be completed within one hundred twenty (120) days of the approval date of this application and permit as set forth below, otherwise this application and permit shall become null and void.

By ______________________

Title ______________________

Permit will be granted, subject to your approval of the following changes and rearrangements at an estimated cost to you of $ ______, payable in advance.

Permit denied under Section 13.2, ________, 19 ____.

The above changes and rearrangements approved ____, 19 ____, and advance payment therefor enclosed.

By ______________________

Title ______________________

Permit Approved ____, 19 __ By ______________________

Permit No. ____________
Total Previous Attachments

Attachments This Permit __ Title ______________________
New Total ____________

ATTACHMENT RENTAL CONTRACT
AND
FLORIDA POWER CORPORATION

Notification of Removal by Television Company

________, 19 ___

____

In accordance with the terms of the agreement dated ________, 19 ___, kindly cancel from your records the following poles covered by Permit No. ________, from which attachments were removed on ________, 19 ___.

Location: City ________ County ________, Florida.

Pole Number	Permit No.	Pole Location

By ______________

Title ______________

Notice Acknowledged

________, 19 ___

By ______________

Title ______________

Notice No. ________

Total Poles Discontinued This Notice ______

Poles Previously Vacated ______

Total Poles Vacated To Date ______

SCHEDULE "I"

1. March 1, 1972—between Florida Power Corporation and Teleprompter Gulf Coast CATV Corporation—service in Town of Belleair Bluffs, Town of Belleair Beach, Town of Indian Rocks Beach, Town of Indian Rocks Beach South Shore, City of Largo and City of Seminole, Florida.

2. March 30, 1973—between Florida Power Corporation and Teleprompter of Florida, Inc.—service in the City of Clermont, Florida.

3. March 30, 1973—between Florida Power Corporation and Teleprompter of Florida, Inc.—service in City of Minneola, Florida.

4. July 8, 1974—between Florida Power Corporation and Teleprompter of Florida, Inc.—service in City of Oakland, Florida.

5. May 27, 1971—between Florida Power Corporation and Teleprompter Corporation—service in City of Treasure Island, Florida.

6. March 15, 1972—between Florida Power Corporation and Teleprompter Gulf Coast CATV Corporation—Town of Safety Harbor, Florida.

7. January 4, 1971—between Florida Power Corporation and Teleprompter Gulf Coast CATV Corporation—service in City of St. Petersburg Beach, City of Gulfport and Town of South Pasadena, Florida.

8. September 1, 1970—between Florida Power Corporation and The TM Communications Company of Florida—service in New Port Richey, Florida and the unincorporated areas of Pasco County in the West Pasco marketing area, to include all sections in Twp. 26 S, Rges. 15 E, 16E, and 17 E; all sections in Twp. 25 S. Rge. 16 E, and 17 E; Secs. 21-28, and Secs. 33-36 (incl.) of Twp. 24 S, Rge. 16 E; Secs. 19-36 (incl.) of Twp. 24 S, Rge. 17 E.

9. May 19, 1971—between Florida Power Corporation and TM Communications Company of Florida—service in City of St. Petersburg, Florida.

10. March 6, 1972—between Florida Power Corporation and TM Communications Company of Florida—service in Haines City and the surrounding service area of Polk County and the incorporated areas of Lake Hamilton, Dundee, and Davenport.

11. October 20, 1970—between Florida Power Corporation and The TM Communications Company of Florida—service within the unincorporated areas of Volusia County, Florida.

12. October 20, 1970—between Florida Power Corporation and The TM Communications Company of Florida—service in City of DeLand, Florida.

13. October 28, 1970—between Florida Power Corporation and TM Communications Company—service in City of Winter Garden, Florida.

14. October 28, 1970—between Florida Power Corporation and TM Communications Company—service in City of Ocoee, Florida.

15. March 30, 1973—between Florida Power Corporation and Teleprompter of Florida, Inc.—service within the unincorporated areas of Lake County, Florida (as described in Exhibit "A" of the basic franchise)

16. March 15, 1971—between Florida Power Corporation and the TM Communications Company of Florida—service in the unincorporated areas of Orange County, Florida, as indicated on the attached Florida Power Drawing No. 71108AP, dated 3/10/71.

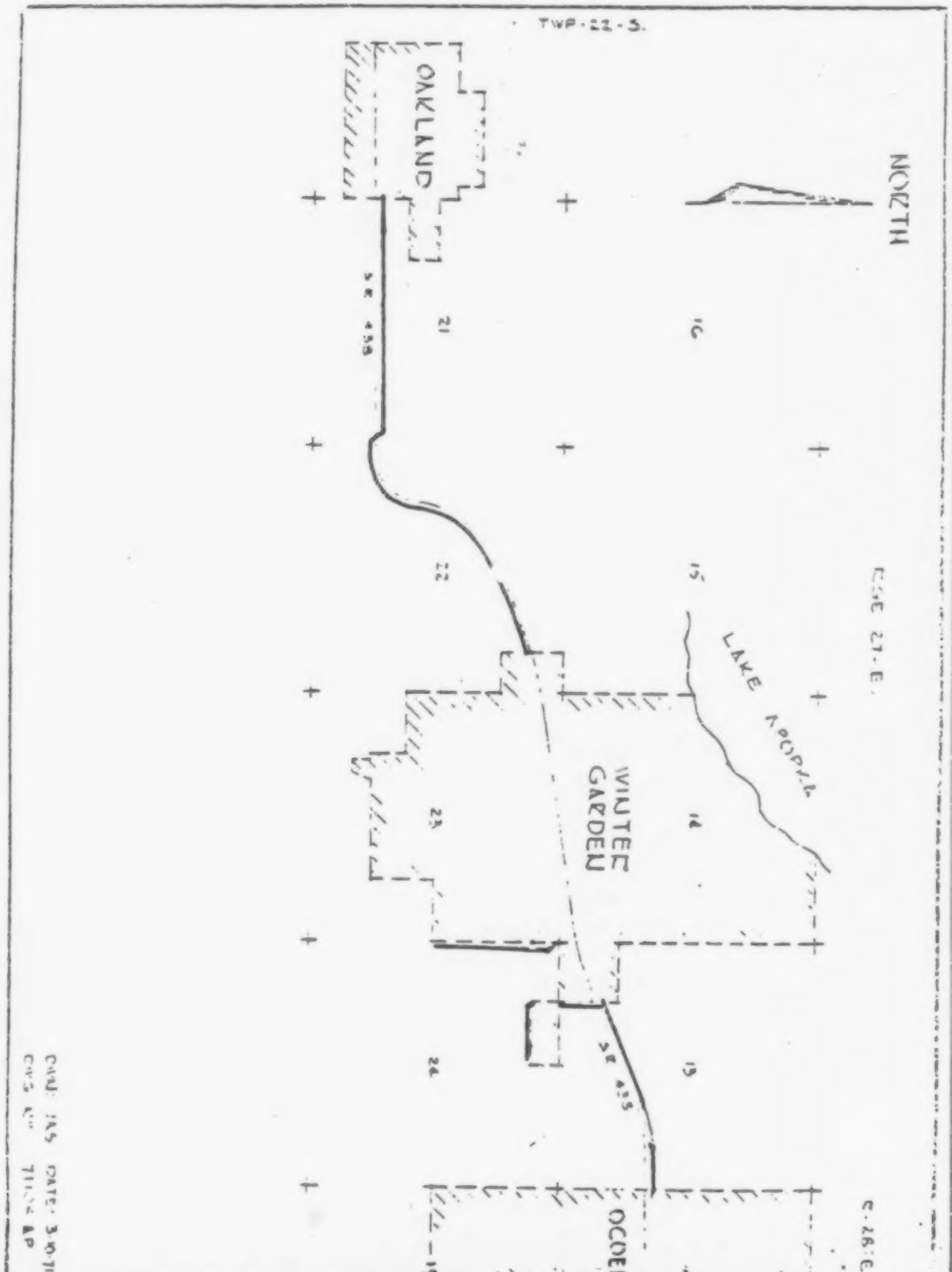
17. October 30, 1972—between Florida Power Corporation and TM Communications Company—for service in Town of Orange City.

Description of Lands to be Included

All of the following lands lying in Lake County, Florida, excluding all areas within the city limits of all municipalities now incorporated by law:

1. Those lands lying in the southern portion of Lake County, Florida, in township 21, 22, 23 and 24 south.

2) Those lands lying in Lake County, Florida within the boundary lines as below described: Beginning at the intersection of the range line dividing ranges twenty-three and twenty-four east with the township line dividing townships twenty-four and twenty-five south; thence east on said township line to the range line dividing ranges twenty-four and twenty-five east; thence north on said range line to the section line dividing sections thirty and thirty one, in township twenty-four south; range twenty-five east; thence east on the north line of sections thirty-one, thirty-two, thirty-three and thirty-four in said township twenty-four south, range twenty-five east, to the northeast corner of said section thirty-four; Thence south on the east line of said section thirty-four to the township line dividing townships twenty-four and twenty-five south; thence east on said township line to the range line dividing ranges twenty-six and twenty-seven east; thence north on said range line to the township line dividing townships twenty and twenty-one south; thence west on said township line to the range line dividing ranges twenty-three and twenty-four east; thence south on said range line to the point of beginning.



AMENDMENT AGREEMENT TO ATTACHMENT AGREEMENT BETWEEN TELEPROMPTER CORPORATION AND TELEPROMPTER SOUTHEAST, INC. AND FLORIDA POWER CORPORATION

THIS AMENDMENT AGREEMENT, made and entered into this 20th day of February, 1979, by and between FLORIDA POWER CORPORATION, a private corporation organized and existing under the laws of the State of Florida, hereinafter referred to as "ELECTRIC COMPANY", and Teleprompter Corporation, organized and existing under the laws of the State of New York, and Teleprompter Southeast, Inc., organized and existing under the laws of the State of Alabama, herein collectively referred to as the "TELEVISION COMPANY".

WITNESSETH:

WHEREAS, Electric Company and Television Company made and entered into a CONTRACT on the 1st day of July, 1977, providing the attachment of Television Company cables, wires and appliances to Electric Company poles; and

WHEREAS, the parties hereto are desirous of expanding the scope of said attachment agreement so as to permit the attachment of Television Company facilities to Electric Company anchors;

NOW, THEREFORE, in consideration of the above premises and of the mutual benefits from the covenants herein set forth, the parties hereto agree as follows:

1. That the term "Pole" or "Pole Line" shall be defined to include Electric Company screw anchors.

2. That Section 2.1 be revised to include the following additional wording: Before making any attachments to any anchor or anchors of the Electric Company, the Television Company shall make application and receive a permit, therefore, in the form of Exhibit C, attached hereto and made a part hereof.

   Unless waived in writing by the Electric Company, the Television Company shall commence and complete all attachment work within the time limits set forth in said Exhibit C.

3. That Section 2.7 be added with the following wording:

   Section 2.7 All anchor installations will be made in accordance with drawing marked 10-F, attached hereto and by this reference thereto incorporated herein, when not otherwise specified by the Electric Company, and is descriptive of the minimum required construction, and will be amended as related Electric Company specifications are changed.

4. That Section 7.2 be added with the following wording:

   Section 7.2 The Television Company shall pay to the Electric Company, for attachments made to screw anchors under this greement, a one-time rental charge of $16.50 per anchor attachment. Said rental charge shall be paid in accordance with Section 5.2 and is non-refundable, regardless of the period of time an anchor attachment exists. The aforementioned one-time rental charge for *anchor* attachments will be subject to revision in accordance with the terms set forth in Section 8.2.

5. That section 8.2 be added with the following wording:

   Section 8.2 The one-time rental charge for Television Company attachments to Electric Company anchors shall be revised periodically to reflect one-half (1/2) the Electric Company's estimated average installed cost of a typical anchor installation. The Television Company shall be notified by letter of each rate change at least one (1) month prior to the effective date of each such rate change.

6. That Section 15.6 be added with the following wording:
   Section 15.6 It shall be the Television Company's responsibility to bond its down guy(s) to the Electric Company down guy(s) attached to the same Electric Company pole.

7. Except as hereby amended, all the terms of said CONTRACT dated the first day of July ___ , 1977, shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have entered into this AMENDED AGREEMENT as of the day and year first above written.

*See attached provision marked "A":

(Corporate Seal)	FLORIDA POWER CORPORATION
Attest: /s/ Betty M. Clayton Ass't Secretary	By: /s/ Ned B. Sparke Vice-President
(Corporate Seal)	TELEPROMPTER CORPORATION

Attest: /s/ Claire Feldman
Ass't Secretary

By: /s/ Richard M. Sykes
Vice-President

(Corporate Seal)

TELEPROMPTER SOUTH-EAST, INC.

Attest: /s/ Claire Feldman
Ass't Secretary

By: /s/ Richard M. Sykes
Vice-President

"A"

Execution and delivery of Agreement by the Licensee shall not constitute a waiver by Licensee of its right, if any, to challenge any of the terms of the Agreement pursuant to applicable Federal, State or locak [*sic*] laws and regulations, now or hereafter enacted or promulgated, with respect to Pole Attachment Agreements.

EXHIBIT C

ANCHOR
ATTACHMENT RENTAL CONTRACT
TELEPROMPTER CORPORATION AND
TELEPROMPTER SOUTHEAST, INC.
AND
FLORIDA POWER CORPORATION

Application and Permit

__________, 19____

____

In accordance with the terms of agreement dated ____, 19____, application is hereby made for permit to make attachments to Florida Power Corporation anchors for installation of down guy facilities as indicated on the attached construction detail drawing/s number/s ________. Certified copies of approved construction permits, as may be required by local governmental authority for the facilities indicated on the drawing/s, are attached also. Construction work, as provided for under this "Application and Permit", shall commence within thirty (30) days and be completed within one hundred twenty (120) days of the approval date of this application and permit as set forth below, otherwise this application and permit shall become null and void.

The maximum allowable conductor tension under light loading is __________ #.

By:____________________

Title:____________________

Permit will be granted, subject to your approval of the following changes and rearrangements at an estimated cost to you of $__________, payable in advance.

Permit denied under Section 13.2, __________, 19____.

The above changes and rearrangements approved _____ , 19____ and advance payment therefore enclosed.

By:____________________

Title:____________________

Permit Approved ______ , 19

Permit No. ____________

Total Previous Attachments

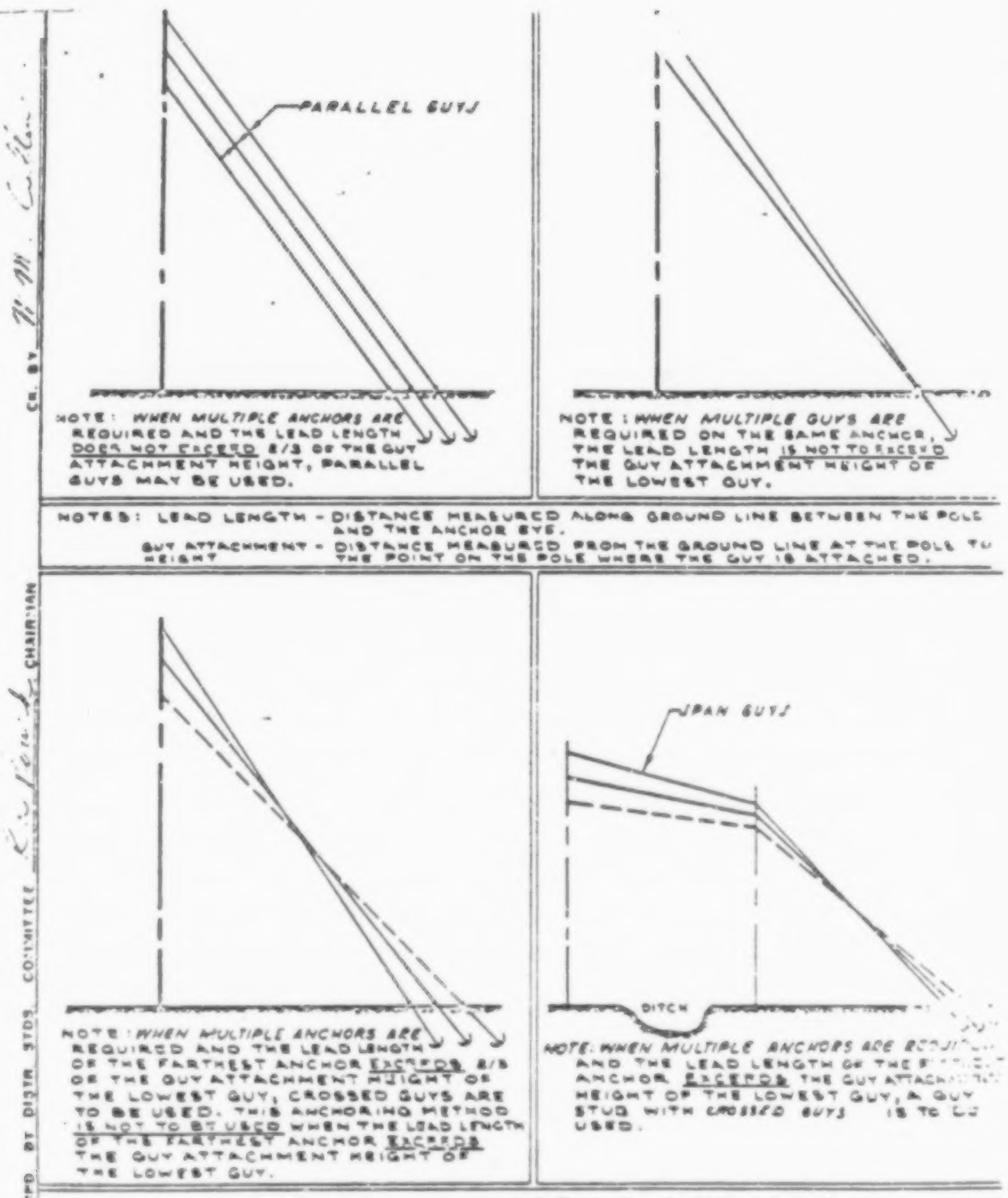
By:____________________

____

Attachments This Permit _

New Total ____________

Title:____________________



TYPICAL ANCHORING METHODS

AMENDMENT TO ATTACHMENT AGREEMENT BETWEEN FLORIDA POWER CORPORATION AND TELEPROMPTER CORPORATION AND TELEPROMPTER SOUTHEAST, INC.

THIS AGREEMENT, made and entered into this 18 day of June, 1979, by and between Florida Power Corporation, a Florida corporation, the Electric Company herein, and Teleprompter Corporation, a New York corporation, and Teleprompter Southeast, Inc., an Alabama corporation, collectively the Television Company herein.

WITNESSETH:

WHEREAS, the patries [*sic*] have heretofore entered into an attachment agreement dated the 1st day of July, 1977, the Attachment Agreement herein, authorizing the Television Company to attach its facilities to the poles of the Electric Company in specified geographic areas described in Schedule "I" of the Attachment Agreement.

WHEREAS, the parties now desire to expand the geographic areas included within the Attachment Agreement so as to permit the Television Company to attach its facilities on poles of the Electric Company within the City of Goveland [*sic*], Florida and the City of Mascotte, Florida.

NOW THEREFORE, in consideration of the above premises [*sic*] and of the mutual benefits from the covenants herein set forth, the Electric Company and the Television Company do hereby agree as follows:

1. The Attachment Agreement is hereby amended by adding the following provision to Schedule "I" after item 17:

> "18. June 18, 1979—between Florida Power Corporation and Teleprompter Corporation and Teleprompter Southeast, Inc.—for service to the City of Groveland, Florida and the City of Mascotte, Florida."

2. Except as amended herein, the Attachment Agreement shall be unaffected by this agreement and shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate, and their corporate seal to be affixed thereto, by their respective officers thereunto duly authorized, on the day, month and year first above written.

(corporate seal)	FLORIDA POWER CORPORATION
Attest: /s/ Betty M. Clayton Ass't Secretary	By /s/ Ned B. Sparke Vice President
(corporate seal)	TELEPROMPTER CORPORATION
Attest: /s/ Claire Feldman Ass't Secretary	By /s/ Illegible Illegible
(corporate seal)	TELEPROMPTER SOUTHEAST, INC.
Attest: /s/ Claire Feldman Ass't Secretary	By /s/ Illegible President

LAW OFFICES OF
HOGAN & HARTSON

815 CONNECTICUT AVENUE
WASHINGTON, D.C. 20006

TELEPHONE (202) 331-4500
CABLE ADDRESS "HOGANDER WASHINGTON"
TELEX 89-2757-64353

WRITER'S DIRECT DIAL NUMBER
(202) 331-4796

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

June 2, 1980

James A. McGee, Esquire
Corporate Counsel
Florida Power Corporation
3201 Thirty-Fourth Street South
P.O. Box 14042
St. Petersburg, Florida 33733

Re: Pole Attachment Agreements Between Florida Power Corporation and Teleprompter Corporation

Dear Mr. McGee:

As you may be aware, on May 29, 1980, The Florida Supreme Court held in *Teleprompter Corporation* v. *Hawkins*, No. 56,291, that the Florida Public Service Commission has no jurisdiction to regulate pole attachment rates. Accordingly, we now renew Teleprompter's request for information related to Florida Power's pole attachment rates, in anticipation of the PCS's prompt withdrawal of its certification of jurisdiction made to the Federal Communications Commission under Section 224 of the Communications Act of 1934, as amended.

Teleprompter Corporation is currently paying annual rate of $6.24 (Deland, Haines City, New Port/Richey, and Winter Garden) and $5.74 (St. Petersburg) for attachment to Florida Power's poles. So that we may assess the pro-

priety of this rate under Section 224 of the Communications Act of 1934, as amended, we hereby request the data set forth below. The information provided to us should be based upon historical costs and should use data on the Federal Energy Regulatory Commission's Form 1.

The requests herein are limited to data relating to your service area within the State of Florida. Please specify if data are provided on any other basis. Also, please include all calculations and work sheets necessary to verify the requested data. We request you provide us with your most current data and accompany your responses with such information as is necessary to identify the dates of the data provided.

Specifically we request the following:

(1) The gross investment in pole lines.

(2) The depreciation reserve from the gross investment in pole lines.

(3) The gross investment in cross-arms, guys, anchors and other equipment, either not useful in pole attachment or previously paid for or provided separately by the cable operator.

(4) The depreciation reserve from the gross investment specified in (3).

(5) The number of poles (a) owned, and (b) controlled or used by Florida Power.

(6) The number of poles owned, controlled, or used by Florida Power on which are television cable attachments which are subject to agreements with Teleprompter Corporation.

(7) The number of poles included in (6) which Florida Power controls or uses through lease between Florida Power and other owners, and the amounts paid by Florida Power under such lease(s).

(8) The number of poles included in (6) which Florida Power owns and which are leased to other users by Florida Power and the amounts received by Florida Power under such lease(s).

(9) The components of annual carrying charges attributable to the cost of owning a pole as listed below. These charges may be expressed as a percentage of the *net* pole investment. If the annual carrying charges are expressed in any other form (*e.g.*, as a percentage of gross investment) please specify such basis and the assumptions used. For each of the following components of the annual carrying charge, please specify the account or accounts of FERC Form 1 used in computing the carrying charge and provide sufficient calculations to verify the charge claimed.

(a) Maintenance expenses.

(b) Depreciation. Specify the average life expectancy for poles, the net salvage value and the method of depreciation used.

(c) *Ad valorem* taxes attributable to poles.

(d) Administration and overhead not directly allocable to any other revenue generating service or services. In order to compute attributable administration and overhead expenses, the total of such expenses and the net investment in total plant are also requested.

(e) Cost of capital. In order to compute the cost of capital, the following items are requested: (i) allowable rate of return authorized by the appropriate regulatory agency; (ii) cost of debt (interest rate); (iii) cost of equity, both common and preferred (including an adjustment for income taxes actually paid); and (iv) the relative amounts of debt, preferred equity, and common equity.

(10) The amount of reimbursements, if any, which have been received from cable operators for non-recurring costs, including pre-construction make-ready and changeouts, and which have been included in (1) above. Please state whether or not such reimbursements have been subtracted from the amounts set forth in (1)-(4) above.

The foregoing requests are pursuant to 47 C.F.R. §§ 1.1401-1.1415, as adopted by the Federal Communications Commission in its *First Report and Order in CC Docket 78-144*, 68 F.C.C.2d 1585 (1978), its *Second Report and Order in CC Docket 78-144*, 72 F.C.C.2d 59 (1979), and its *Memorandum Opinion and Order in CC Docket 78-144*, 46 R.R.2d 1637 (1980). It is requested that you respond to this request by letter dated no later than thirty (30) days after the date hereof. We are anxious to cooperate and hope that you will respond fully and promptly. Under the terms of the FCC's rules, failure to provide the data requested, promptly and in usable form, may result in findings by the FCC adverse to Florida Power Corporation.

Sincerely,

/s/ GARDNER F. GILLESPIE
Gardner F. Gillespie
Attorney for
Teleprompter Corporation

GFG:tmb

EXHIBIT C

Calculation of Maximum Lawful Rate

1. *Net Investment in Bare Poles.* Net investment in bare poles may be expressed as the difference of gross pole investment minus pole depreciation reserve, less an additional 15% to reflect that part of the gross plant attributable to cross arms and other items not usable for CATV attachments. It is assumed that the pole depreciation reserve bears the same ratio to gross pole investment as the total plant depreciation reserve bears to total plant investment.

$$\frac{\text{Plant Depreciation Reserve}}{\text{Gross Plant Investment}} = \text{Ratio of Pole Depreciation Reserve to Gross Pole Investment}$$

$$\frac{\$414,191,834}{\$2,043,936,824} = 20.3\%$$

20.3% x Gross Pole Investment = Pole Depreciation Reserve

20.3% x \$81,841,613 = \$16,613,847

85% x (Gross Pole Investment - Pole Depreciation Reserve) = Net Investment in Bare Poles

85% x (\$81,841,613 - \$16,613,847) = \$55,443,601

2. *Net Investment Per Bare Pole.* Net investment per bare pole may be expressed as the quotient of net investment in bare poles divided by the number of poles.

$$\frac{\text{Net Investment in Bare Poles}}{\text{(Number of Poles)}} = \text{Net Investment per Bare Pole}$$

$$\frac{\$55,443,601}{?} = ?$$

Because the number of poles owned by Respondent is not publicly available, it is assumed that Respondent's net investment per bare pole is no greater than that of its

geographic neighbor, General Telephone Company of Florida.

From information available on FCC Form M for the year ending December 31, 1979, General Telephone's net investment per pole can be shown to be \$57.18, following the formula prescribed by the Commission in Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, No. 80-372 (F.C.C., July 19, 1980).

Gross pole investment is \$11,915,853. Form M at 19 line 11, col. (h). The ratio of the pole depreciation reserve to gross pole investment can be estimated by finding the ratio of the depreciation reserve for all plant to gross plant investment.

$$\frac{\text{Plant Depreciation Reserve}}{\text{Gross Plant Investment}} = \frac{\$387,662,630}{\$1,770,047,179} = 21.9\%$$

Form M at 12 line 6, col. (c) & 19 line 23, col. (h).

21.9% x Gross Pole Investment = Pole Depreciation Reserve

21.9% x \$11,915,853 = \$2,609,572

85% x (Gross Pole Investment - Pole Depreciation Reserve) = Net Investment in Bare Poles

85% x (11,915,853 - 2,609,572) = \$7,910,339

$$\frac{\text{Net Investment in Bare Poles}}{\text{Number of Poles}} = \text{Net Investment per Bare Pole}$$

$$\frac{\$7,910,339}{138,332} = \$57.18$$

Number of poles: Form M At 74 line 1, col. (n).

3. *Carrying Charge.* Carrying Charge is composed of maintenance expenses, depreciation, administrative expense, taxes, and cost of capital.

a. *Maintenance Expense.* Maintenance expense for poles may be expressed as a percentage of net investment by dividing the annual pole maintenance expense by the net pole investment (gross pole investment less depreciation reserve):

$$\frac{\text{Pole Maintenance Expense}}{\begin{pmatrix}\text{Gross Pole} & - & \text{Depreciation}\\ \text{Investment} & & \text{Reserve}\end{pmatrix}} = \text{Maintenance Expense (expressed as a percentage of net pole investment)}$$

$$\frac{\$8{,}107{,}911}{(\$81{,}841{,}613 - \$16{,}613{,}847)} = 12.4\%$$

b. *Depreciation.* The depreciation rate does not appear in FERC Form 1 and has not been disclosed by Respondent. It may be calculated for straight-line depreciation as the quotient of 1 minus salvage value (as a proportion of cost) divided by the useful life of a utility pole.

$$\frac{(1 - \text{salvage value})}{30} = \text{depreciation rate for gross investment}$$

$$\frac{1 - 0}{30} = 3.3\%$$

$$\text{Depreciation Rate for Gross Pole Investment} \times \frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = \text{Depreciation (expressed as a percentage of net pole investment)}$$

$$3.3\% \times \frac{\$81{,}841{,}613}{(\$81{,}841{,}613 - \$16{,}613{,}847)} = 4.1\%$$

c. *Administrative Expense.* Form 1 does not provide figures for administrative expenses associated only with poles. We have assumed, for purposes of developing a complete carrying charge, that net pole investment carries

the same proportion of these expenses as total net plant. The administrative expense may be expressed as a percentage of net plant investment by dividing the administrative expense by the difference between the gross plant investment and plant depreciation reserve.

$$\frac{\text{Administrative Expense}}{\begin{pmatrix}\text{Gross Plant} & - & \text{Depreciation}\\ \text{Investment} & & \text{Reserve}\end{pmatrix}} = \text{Administrative Expense (expressed as a percentage of net plant investment)}$$

$$\frac{\$22{,}714{,}058}{(\$2{,}043{,}936{,}824 - \$414{,}191{,}834)} = 1.4\%$$

d. *Taxes.* Form 1 does not provide figures for tax expense attributable to pole lines only. It is therefore assumed that net pole investment bears the same proportion of tax expenses as total net plant. Tax expense may be expressed as a percentage of net plant by dividing taxes paid by the difference between the gross plant investment and plant depreciation reserve.

$$\frac{\text{Taxes Paid}}{\begin{pmatrix}\text{Gross Plant} & - & \text{Depreciation}\\ \text{Investment} & & \text{Reserve}\end{pmatrix}} = \text{Taxes (expressed as percentage of net plant investment)}$$

$$\frac{\$74{,}931{,}556}{(\$2{,}043{,}936{,}824 - \$414{,}191{,}834)} = 4.6\%$$

e. *Cost of Capital.* Form 1 does not include a cost of capital figure (return on equity and interest on debt). Therefore, we have used the reasonable assumption of 10% for the cost of capital component of the carrying charge.

10%

f. *Total Carrying Charge.* Adding the various percentage components, we have determined the appropriate carrying charge to be 32.5%:

Maintenance Expense	12.4%
Depreciation	4.1%
Administrative Expense	1.4%
Taxes	4.6%
Cost of Capital	10.0%
TOTAL CARRYING CHARGE	32.5%

4. *Use ratio.* The use ratio may be expressed as the quotient of the space occupied by CATV (1 foot) and the total useable space. Since Respondent has not provided any data to calculate useable space, it may be presumed that a reasonable estimate of 13.5 feet may be used. 47 C.F.R. § 1.1409(a); Second Report and Order in CC Docket 78-144, 72 F.C.C.2d 59, 68-69, (1979); Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Tel. Co. of W. Va., No. 80-732, ¶ 9 (F.C.C. July 16, 1980).

$$\frac{\text{Space used by CATV}}{\text{Total Useable Space}} = \text{Use Ratio}$$

$$\frac{\text{1 Foot}}{\text{13.5 Feet}} = 7.41\%$$

5. *Maximum Rate.* The maximum rate is the product of net investment per bare pole times the carrying charge times the use ratio.

Net Investment per bare pole
x Carrying Charge
x Use Ratio
= Maximum Rate

$57.18
x 32.50%
x 7.41%
= $ 1.38

6. *Source of Data.* The following table provides the location in Form 1 for the various figures used in the calculations.

Table of Location in FERC Form 1

Item	*Page*	*Location*
Gross Plant Investment	113	Schedule B, Summary of Utility Plant and Accumulated Provisions for Depreciation, Amortization and Depletion, Line No. 12, Column (b)
Plant Depreciation Reserve	113	Schedule B, Summary of Utility Plant and Accumulated Provisions for Depreciation, Amortization and Depletion, Line No. 13, Column (b)
Pole Maintenance Expense	419	Electric Operation and Maintenance Expenses, Line No. 118, "593 Maintenance of Overhead Lines," Column (b)
Gross Pole Investment	402	Electric Plant in Service, Line No. 59, "364 Poles, Towers and Fixtures," Column (g)
Administrative Expense	420	Electric Operation and Maintenance Expenses, Line No. 164, "Total Operation" Column (b)
Taxes Paid	114	Statement of Income for the Year, Lines 11-13, Taxes, Column (c)

ANNUAL REPORT
of
GENERAL TELEPHONE COMPANY OF FLORIDA
TAMPA, FLORIDA

TO THE

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FOR THE

YEAR ENDED DECEMBER 31, 1979

Two copies of the published annual report to stockholders were forwarded in the Commission about March 31, 1980

Officer or other person to whom correspondence should be addressed concerning this report:

Robert A. Lindsay	Vice President and Controller
610 Morgan Street	Tampa Florida
224-4581	

This information is to be kept current by prompt notification to the Commission of any changes until the report for the successing year has been submitted.

10. BALANCE SHEET
Assets and Other Debits

Line No.	Item (a)		Balance at Beginning of the Year (b)	Balance at End of the Year (c)	Increase (d)
	TELEPHONE PLANT		$	$	$
1	100.1 Telephone plant in service	12A	1,615,415,327	1,770,047,179	154,631,852
2	100.2 Telephone plant under construction	12A	79,777,952	93,098,447	13,220,495
3	100.3 Property held for future telephone use	12A	1,673,161	26,886	(1,646,275)
4	100.4 Telephone plant acquisition adjustment	13B	—	—	—
5	Subtotal (Lines 1 to 4, inclusive)	......	1,696,866,440	1,863,172,512	166,306,072
6	Less: 171 Depreciation reserve	14A	348,157,461	387,662,630	39,505,169
7	172 Amortization reserve	15A	—	—	—
8	Line 5 minus lines 6 and 7	......	1,348,708,979	1,475,509,882	126,800,903
9	100.7 Telephone plant adjustment	......	—	—	—
10	Total (line 8 plus line 9)	......	1,348,708,979	1,475,509,882	126,800,903
	INVESTMENTS AND FUNDS				
11	101.1 Investments in affiliated companies	17	—	—	—
12	101.2 Advances to affiliated companies	17	—	—	—
13	102 Other investments	17	5,750	1,000	(4,750)
14	103 Miscellaneous physical property	16	5,299,577	2,752,191	(2,547,386)
15	104 Sinking funds (excluding respondent's own issues) (see Note 1)	18	—	—	—
16	136 Provident funds (excluding respondent's own issues) (see Note 1)	60D	—	—	—
17	137 Insurance and other funds (excluding respondent's own issues) (see Note 1)	18	—	—	—
18	Total	......	5,305,327	2,753,191	(2,522,163)
	CURRENT ASSETS				
19	113 Cash	......	7,389,055	9,434,022	2,044,967
20	114 Special cash deposits	19	866,919	1,015,195	148,276
21	115 Working funds	......	216,650	220,900	4,250
22	116 Temporary cash investments	17	—	—	—
23	117.1 Notes receivable from affiliated companies	20	—	—	—
24	117.2 Other notes receivable	20	69,425	91,775	22,350
25	118 Due from customers and agents (see Note 2)	21A	50,762,953	64,503,466	13,740,513
26	120.1 Accounts receivable from affiliated companies	21	1,587,763	3,685,473	2,097,710
27	120.2 Other accounts receivable	21	2,174,451	5,038,651	2,864,200
28	121 Interest and dividends receivable	......	—	—	—
29	122 Material and supplies	......	27,634,850	37,537,266	9,902,416
30	123 Other current assets	......	—	—	—
31	Total	......	90,702,066	121,526,748	30,824,682
	OTHER ASSETS				
32	126 Subscriptions to capital stock	......	—	—	—
33	127 Subscriptions to funded debt	......	—	—	—
34	Total	......	—	—	—
	PREPAID ACCOUNTS AND DEFERRED CHARGES				
35	129 PREPAID RENTS	......	1,105,779	1,402,268	296,489
36	130 Prepaid taxes	36B	84,624	90,540	5,916
37	131 Prepaid insurance	......	891,099	473,263	417,836)
38	132 Prepaid directory expenses	......	357,450	409,300	51,850
39	133 Other prepayments	......	222,029	663,193	441,164
40	135 Discount on long-term debt	......	4,764,405	4,503,412	(260,993)
41	138 Extraordinary maintenance and retirements	22	—	—	—
42	139 Other deferred charges	22	1,468,806	1,845,942	377,117
43	Total	......	8,894,212	9,337,919	493,707
44	Total Assets and Other Debits	......	$1,453,610,584	$1,609,277,740	$ 155,567,156

( ) denotes reverse amount

12A. ANALYSIS OF TELEPHONE PLANT ACCOUNTS

Report in column (c) all amounts relating to purchases of plant accounted for in accordance with paragraphs (a) and (b) of Section 31.2-21 of the Commission's Rules.

2. Each transfer or adjustment between accounts listed in this schedule, or between accounts listed in this schedule and other accounts, shall be included in column (g) and explained in a note, except the following which shall be included in columns (c) through (f), as appropriate: (1) transfers and adjustments amounting to less than $5,000; (2) adjustments and corrections of additions and retirements for the current or the preceding year, (3) transfers involving account 100.2 the plant accounts, and account 100.3 made in connection with the closing of the records of construction work orders or authorizations; and (4) routine entries relating to the acquisition, sale, retirement, or change in the use, of plant, such as transfers among accounts 201 to 264, inclusive, 276, 277, 100.3 and 100.4.

Line No.	Account (a)	Balance at Beginning of the Year (b)	CHARGES DURING THE YEAR: Plant Acquired from Predecessors (see instruction 1) (c)	CHARGES DURING THE YEAR: Other Plant Added (d)
		$	$	$
	100.1 TELEPHONE PLANT IN SERVICE			
1	201 Organization	—		—
2	202 Franchises	—		—
3	203 Patent rights	—		—
4	207 Right-of-way (Deleted 1-1-60)	—		—
5	211 Land	11,747,189		373,076
6	212 Buildings	112,087,971		4,507,330
7	221 Central office equipment	660,369,661		90,620,378
8	231 Station apparatus	130,784,529		32,227,422
9	232 Station connections	162,253,776		41,306,590
10	234 Large private branch exchs.	55,983,485		7,708,398
11	241 Pole lines	11,401,694		820,648
12	242.1 Aerial cable	56,774,025		3,868,016
13	242.2 Underground cable	90,341,953		12,647,257
14	242.3 Buried cable	216,716,604		29,366,468
15	242.4 Submarine cable	3,810,857		59,171
16	243 Aerial wire	2,296,154		604,132
17	244 Underground conduit	62,422,212		6,226,294
18	261 Furniture and office equip	11,295,443		1,603,236
19	264 Vehicles and other work equip	27,129,774		1,721,731
20	Subtotal (Lines 1-19, incl.)	1,615,415,327		233,661,147
21	276 Telephone plant acquired			
22	277 Telephone plant sold		xx	xx
23	Subtotal (Lines 20-22, incl.)	1,615,415,327		233,661,147
24	100.2 Telephone plant under construction	79,777,952		13,320,495
25	100.3 Property held for future telephone use	1,673,161		(1,646,275)
26	100.4 Telephone plant acquisition adjustment	—		— xx
27	Subtotal (Lines 23-26, incl.)	1,696,866,440		245,335,367
28	100.7 Telephone plant adjustment			
29	Total	$1,696,866,440		$245,335,367

( ) denotes credit amount in column (g) and reverse amount in other columns.

12A. ANALYSIS OF TELEPHONE PLANTS ACCOUNTS - (continued)

3. Credits to accounts listed in this schedule relating to property retired and charged to account 103, "Miscellaneous physical property," shall be included in column (f).

Line No.	CREDITS DURING THE YEAR		Transfers and Adjustments (Charges and (Credits))	Balance at End of the Year
	Plant Sold with Traffic (e)	Other Plant Retired (f)	(g)	(h)
	$	$	$	$
1		—		—
2		—		—
3		—		—
4		(27,404)		12,147,669
5		416,189		116,179,112
6		36,783,048		714,207,491
7		9,286,634		153,725,317
8		14,962,823		188,597,543
9		8,250,143		55,442,240
10		306,489		11,915,853
12		860,932		59,781,109
13		216,851		102,772,359
14		2,029,069		244,054,003
15		(497)		3,870,525
16		202,979		2,697,307
17		46,937		68,601,569
18		1,191,197		11,707,482
19		4,503,905		24,347,600
20		79,029,295		1,770,047,179
21	x	x		
22				
23		79,029,295		1,770,047,179
24		—		93,098,447
25		—		26,886
26		—		—
27		79,029,295		1,863,172,512
28		—		—
29		79,029,295		1,863,172,512

( ) denotes credit amount in column (g) and reverse amount in other columns.

50. OUTSIDE PLANT STATISTICS

1. Report the mileage at the end of the year for all solely owned plant and the respondent's proportionate interest in jointly owned plant.
2. If any required data are available only in part or on an estimated basis, explain in a note.

Line No.	State or Territory (a)	Miles of Aerial Wire (b)	AERIAL CABLE		UNDERGROUND CABLE	
			Miles of Cable (c)	Miles of Wire in Cable (d)	Miles of Cable (e)	Miles of Wire in Cable (f)
1	Florida	6,249	8,620	1,553,500	1,962	4,305,997
2						
3						
4						
5						
6						
7						
8						
9						
10						
11						
12						
13						
14						
15	Total	6,249	8,620	1,553,500	1,962	4,305,997

Line No.	State or Territory (m)	Number of Poles (n)	Miles of Tube in Coaxial Cable (o)	UNDERGROUND CONDUIT	
				Trench Miles (p)	Duct Miles (q)
1	Florida	138,332	586	1,821	7,944
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					
15	Total	138,332	586	1,821	7,944

ELECTRIC UTILITIES AND LICENSEES

(Classes A and B)

ANNUAL REPORT

OF

FLORIDA POWER CORPORATION

(Exact legal name of respondent)

3201 - 34TH STREET SOUTH, ST. PETERSBURG, FLORIDA 33711

(Address of principal business office at end of year)

TO THE

FEDERAL ENERGY REGULATORY COMMISSION

YEAR ENDED DECEMBER 31, 1979

Name, title, address and telephone number (including area code), of the person to be contacted concerning this report:

R. R. HAYES, VICE-PRESIDENT AND CONTROLLER

3201 - 34TH STREET SOUTH, ST. PETERSBURG, FLORIDA 813-866-5151

STATEMENT B SUMMARY OF UTILITY PLANT AND ACCUMULATED PROVISIONS FOR DEPRECIATION, AMORTIZATION AND DEPLETION

Line No	Item (a)	Total (b)	Electric (c)	Gas (d)	(e)	(f)	Common* (g)
1	UTILITY PLANT	$	$	$	$	$	$
2	In Service:						
3	Plant in Service (Classified)	1925 228 144	1925 228 144				
4	Plant Purchased or Sold						
5	Completed Construction not Classified						
6	Experimental Plant Unclassified						
7	Total	1925 228 144	1925 228 144				
8	Leased to Others						
9	Held for Future Use	2 433 496	2 433 496				
10	Construction Work in Progress	116 275 184	116 275 184				
11	Acquisition adjustments						
12	Total Utility Plant	2043 936 824	2043 936 824				
13	Accum. Prov. for Dept., Amort., & Depl.	414 191 834	414 191 834				
14	Net Utility Plant	1629 744 990	1629 744 990				
15	DETAIL OF ACCUMULATED PROVISIONS FOR DEPRECIATION, AMORTIZATION, & DEPLETION						
16	In Service:						
17	Depreciation	414 191 834	414 191 834				
18	Amort. and Depl. of Producing Natural Gas Land and Land Rights						
19	Amort. of Underground Storage Land and Land Rights						
20	Amort. of Other Utility Plant						
21	Total, in Service	414 191 834	414 191 834				
22	Leased to Others:						
23	Depreciation						
24	Amortization and Depletion						
25	Total, Leased to Others						
26	Held for Future Use:						
27	Depreciation						
28	Amortization			$	$		$
29	Total, Held for Future Use						
30	Abandonment of Leases (natural gas)						
31	Amort of Plant Acquisition Adj						
32	Total Accumulated Provisions (should agree with line 13 above)	414 191 834	414 191 834				

*See 351 for detail of common utility plant and exposures

STATEMENT C STATEMENT OF INCOME FOR THE YEAR

Amounts recorded in accounts 412 and 413, Revenue from Utility Plant Leased to Others, will be reported using one of the vertical columns to spread amounts over lines 1 to 19, as appropriate similar to a utility department. These amounts will also be included in columns (c) and (d) totals.

2. Amounts recorded in account 414, Other Utility Operating Income, will be reported in a separate column as prescribed for accounts 412 and 413, above.

3. The space below is provided for important notes regarding the statement of income or any account thereof.

4. Give concise explanations concerning unsettled rate proceedings where a contingency exists that refunds of a material amount may need to be made to the utility's customers or which may result in a material refund to the utility with respect to power or gas purchases. State for each year affected the gross revenues or costs to which the contingency relates and the tax effects together with an explanation of the major factors which affect the rights of the utility to retain such revenues or recover amounts of the utility to retain such revenues or recover amounts paid with respect to power and gas purchasers.

5. Give concise explanations concerning significant amounts of any refunds made or received during the year resulting from settlement of any rate proceeding affecting revenues received or costs incurred for power or gas purchasers. State the accounting treatment accorded such refunds and furnish the necessary particulars, including income tax effects, so that corrections of prior income and

Line	Account (a)	Sch. Page No (b)	TOTAL Current year (c)	TOTAL Increase or decrease from preceding year (d)	ELECTRIC Current year (e)
1	*UTILITY OPERATING INCOME*				
2	Operating Revenues (40C)	—	$835 493 243	$84 273 263	$
3	Operating Expenses				
4	Operation Expenses (401)	—	486 076 137	90 721 045	
5	Maintenance Expenses (402)	—	44 884 750	8 312 436	
6	Depreciation Expense (403)	—	64 356 773	4 996 174	
7	Amort. & Depl. of Utility Plant (404*-405)	—			
8	Amort. of Utility Plant Acq. Adj. (406)	—			
9	Amort. of Property Losses (407)*	—	653 203	653 203	SAME
10	Amort. of Conversion Expenses (407)*	—			
11	Taxes Other Than Income Taxes (408.1)	222	48 664 961	4 038 139	AS
12	Income Taxes-Federal (409.1)	222	21 650 417	(26 452 422)	
13	-Other (409.1)	222	4 615 178	(1 698 217)	TOTAL
14	Provision for Deferred Inc. Taxes (410.1)		33 825 000	4 951 000	
15	Provision for Deferred income Taxes-Cr. (411.1)		(12 234 000)	(5 928 000)	( )
16	Investment Tax Credit Adj.-Net (411.4)	228-9	15 661 000	8 910 000	
17	Gains from Disp. of Utility Plant (411.6)	224A	( )		( )
18	Losses from Disp. of Utility Plant (411.7)	214A			
19	Total Utility Operating Expenses		$708 153 419	$88 503 358	$
20 21	Net Utility Operating Income (carry forward to page 116-A, line 22)		$127 339 824	$ (4 230 095)	$

NOTES TO STATEMENT OF INCOME

Refer to notes on Balance Sheet pages 112, 112A, 112B, and 112C.

*Accounts 404.1, 404.2, 404.3, 407.1, 407.2 for natural gas companies

ELECTRIC PLANT IN SERVICE (Continued)

Line No	Account (a)	Balance beginning of year (b)	Additions (c)	Retirements (d)	Adjustments (e)	Transfers (f)	Balance end of year (g)
33	OTHER PRODUCTION PLANT	$	$	$	$	$	$
34	(340) Land and land rights	2 762 566					2 762 566
35	(341) Structures and improvements	9 239 756	16 881	9 586			9 247 051
36	(342) Fuel holders, prod, and access'rs	13 370 209	12 147	6 719			13 375 637
37	(343) Prime movers	82 879 817	164 168				83 043 985
38	(344) Generators	28 365 698					28 365 698
39	(345) Accessory electric equipment	15 352 178	93 738	5 539			15 440 377
40	(346) Misc power plant equipment	522 762	111 114	3 126		332	631 082
41	Total other prod plant	152 492 986	398 048	24 970		332	152 866 396
42	Total production plant	963 793 618	35 184 977	6 010 263	(44 060)	2 842	992 927 114
43	3 TRANSMISSION PLANT						
44	(350) Land and land rights	20 570 319	487 917	2 186	79 938		21 135 988
45	(352) Structures and improvements	6 555 076	322 474	15 894		(1 462)	6 860 194
46	(353) Station equipment	90 475 326	9 429 084	4 100 916		1 185 337	96 988 831
47	(354) Towers and fixtures	47 751 978	223	334 872		(1 204)	47 416 125
48	(355) Poles and fixtures	44 296 879	8 263 799	936 348	111 064	(3 155)	51 732 239
49	(356) Overhead conductors and devices	76 149 334	7 713 649	961 603	89 720		82 991 100
50	(357) Underground conduit	7 492 502					7 492 502
51	(358) Underground conductors and dev	9 666 266					9 666 266
52	(359) Roads and trails	1 829 306	166153	24 518			1 970 941
53	Total transmission plant	304 786 986	26 383 299	6 376 337	280 722	1 179 516	326 254 186
54	4. DISTRIBUTION PLANT						
55	(360) Land and land rights	3 116 277	68 532		295 303		3 480 112
56	(361) Structures and improvements	6 273 721	971 060	49 147		35 716	7 231 350
57	(362) Station equipment	92 922 149	11 821 350	1 108 349		(1 112 320)	102 522 830
58	(363) Storage battery equipment						
59	(364) Poles, towers, and fixtures	76 013 468	6 918 199	1 159 045	65 836	3 155	81 841 613
60	(365) Overhead conductors and devices	65 118 723	6 327 823	1 182 397	81 565	(1 309)	70 344 405
61	(366) Underground conduit	10 976 511	617 327	68 070		451 018	11 976 786
62	(367) Underground conductors and dev.	28 839 197	3 179 722	382 597	13 430	(473 271)	31 176 481
63	(368) Line transformers	93 910 675	7 997 601	798 898	57 503	15 959	101 182 840
64	(369) Services	47 193 319	6 575 073	302 782	26 670	5 276	53 497 556
65	(370) Meters	31 419 252	2 716 123	226 153		(12 006)	33 897 216
66	(371) Installations on cust premises	228 438	51 658	4 507		(2 928)	272 661

ELECTRIC OPERATION AND MAINTENANCE EXPENSES (Continued)

Line No.	Account (a)	Amount for year (b)	Increase or decrease from preceding year (c)
		$	$
108	DISTRIBUTION EXPENSES (CONTINUED)	$	$
109	586 Meter Expenses	1 875 598	129 965
110	587 Customer installations expenses	810 437	35 551
111	588 Miscellaneous distribution expenses	2 566 305	368 910
112	589 Rents	201 651	18 711
113	Total operation	9 530 820	1 267 512
114	*Maintenance*		
115	590 Maintenance supervision and engineering	846 062	125 008
116	591 Maintenance of structures	150 847	(8 221)
117	592 Maintenance of station equipment	1 874 628	603 313
118	593 Maintenance of overhead lines	8 107 911	1 176 438
119	594 Maintenance of underground lines	928 586	117 959
120	595 Maintenance of line transformers	584 806	259 670
121	596 Maintenance of street lighting and signal systems	820 881	134 079
122	597 Maintenance of meters	218 264	29 850
123	598 Maintenance of miscellaneous distribution plant	119 730	9 323
124	Total maintenance	13 651 715	2 447 419
125	Total distribution expenses	23 182 535	3 714 931
126	CUSTOMER ACCOUNTS EXPENSES		
127	*Operation*		
128	901 Supervision	1 011 725	59 155
129	902 Meter reading expenses	2 590 872	203 036
130	903 Customer records and collection expenses	8 666 740	929 457
131	904 Uncollectible accounts	1 020 000	(446 677)
132	905 Miscellaneous customer accounts expenses	674 694	179 566
133	Total customer accounts expenses	13 964 031	924 537
134	CUSTOMER SERVICE AND INFORMATION EXPENSES		
135	Operation		
136	907 Supervision	69 955	8 225
137	908 Customer assistance expenses	861 729	300 302
138	909 Informational and instructional expenses	411 057	15 242
139	910 Miscellaneous customer service & informational expenses	46 352	2 579
140	Total customer service and informational expenses	1 389 093	326 348
141	SALES EXPENSES		
	Operation		
143	911 Supervision	34 128	5 098
144	912 Demonstrating and selling expenses	75 640	9 434
145	913 Advertising expenses	133	101
146	916 Miscellaneous sales expenses	15 681	7 344
147	Total sales expenses	125 582	21 977
148	ADMINISTRATIVE AND GENERAL EXPENSES		
149	*Operation*		
150	920 Administrative and general salaries	6 775 432	805 634
151	921 Office supplies and expenses	2 548 561	162 972
152	922 Administrative expenses transferred-Cr	(29 473)	(2 077)
153	923 Outside services employed	1 331 660	161 542
154	924 Property insurance	1 964 798	169 309
155	925 Injuries and damages	1 843 746	447 711
156	926 Employee pensions and benefits	6 342 239	(737 551)
157	927 Franchise requirements	—	—
158	928 Regulatory commission expenses	64 604	(59 844)
159	929 Duplicate charges—Cr.	(1 891 931)	(242 421)
160	931.1 General advertising expenses	35 910	(10 459)

ELECTRIC OPERATION AND MAINTENANCE EXPENSES (Continued)

Line No.	Account (a)	Amount for year (b)	Increase or decrease from preceding year (c)
161	ADMINISTRATIVE AND GENERAL EXPENSES (Continued)	$	$
162	930.2 Miscellaneous general expenses Includes 930.3	3 354 865	935 728
163	931 Rents	373 647	(36 319)
164	Total operation	22 714 058	1 594 225
165	*Maintenance*		
166	932 Maintenance of general plant	1 317 145	325 844
167	Total administrative and general expenses	24 031 203	1 920 069
163	Total Electric Operation and Maintenance Expenses	530 960 887	99 033 481

SUMMARY OF ELECTRIC OPERATION AND MAINTENANCE EXPENSES

Line No.	Functional Classification (a)	Operation (b)	Maintenance (c)	Total (d)
169	Power Production Expenses	$	$	$
170	Electric Generation:			
171	Steam power	318 720 936	13 823 196	332 544 132
172	Nuclear power	20 689 143	9 735 300	30 424 443
173	Hydraulic—Conventional	—	—	—
174	Hydraulic—Pumped Storage	—	—	—
175	Other power	43 447 138	3 195 689	46 642 827
176	Other power supply expenses	52 557 929	—	52 557 929
177	Total power production expenses	435 415 146	26 754 185	462 169 331
178	Transmission Expenses	2 937 407	3 161 705	6 099 112
179	Distribution Expenses	9 530 820	13 651 715	23 182 535
180	Customer Accounts Expenses	13 964 031	—	13 964 031
181	Customer Service and Informational Expenses	1 389 093	—	1 389 093
182	Sales Expenses	125 582	—	125 582
183	Adm. and General Expenses	22 714 058	1 317 145	24 031 203
184	Total Electric Operation and Maintenance Expenses	486 076 137	44 884 750	530 960 887

NUMBER OF ELECTRIC DEPARTMENT EMPLOYEES

Number of electric department employees, payroll period ended 12/16/79

1. Total regular full-time employees	3 891
2. Total part-time and temporary employees	307
3. Total employees	4 198

The data on number of employees should be reported for the payroll period ending nearest to October 31, or any payroll period ending 60 days before or after October 31.

If the respondent's payrools for the reported period include any special construction forces include such employees as part-time and temporary employees and show the number of such special construction employees so included.

The number of employees assignable to the electric department from joint functions of combination utilities may be determined by estimate, on the basis of employee equivalents. Show the estimated number of equivalent employees attributed to the electric department from joint functions.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

File No. PA-81-0008

In the Matter of

TELEPROMPTER CORPORATION and
TELEPROMPTER SOUTHEAST, INC.
Complainants,

v.

FLORIDA POWER CORPORATION
Respondent.

To: The Common Carrier Bureau

RESPONSE OF FLORIDA POWER CORPORATION

Pursuant to Section 1.1407 of the Commission's Rules, Florida Power Corporation ("Respondent") hereby responds to the Complaint of Teleprompter Corporation and Teleprompter Southeast, Inc. ("Complainants") filed by Complainants on November 18, 1980.

This response is divided into four parts. In the first part, Respondent answers the specific allegations in the complaint. The second part raises jurisdictional and constitutional objections to Commission grant of the relief requested in the complaint. Notwithstanding these overriding objections, the third part presents two pole attachment rental rates, one calculated in accordance with prior Commission statements on methodology, and a second calculated in accordance with Respondent's conception of a fair and reasonable rate. The fourth and final part makes

a number of procedural requests designed to conserve Commission resources and illuminate particular aspects of this controversy and possible remedies.

Before turning to these specific parts of the response, it is important to fix the context of the dispute. At the heart of the case lies a contract between Complainants and Respondent for the rental of pole space for cable television attachments. The rates established in that contract represent not the dictates of a regulatory regime, but a freely negotiated agreement between Complainants and Respondent. The rental rate now in effect benefits Complainants greatly, for it is much lower than the annual costs they would incur if they owned their own pole system. Yet Complainants now ask the Commission to abrogate the contract and impose a rental rate far lower than the negotiated rate. As a public utility providing electric service, Respondent expects governmental regulation of rates charged for provision of that service. Respondent objects, however, to the unwarranted intrusion of the federal government into an area far beyond the bounds of traditional regulation. Commission abrogation of a binding contract for the rental of Respondent's pole space for cable television attachments would be such an unwarranted intrusion.

I. Answers to Allegations in Complaint

1. Respondent lacks sufficient knowledge to respond to the allegations of paragraph 1 of the complaint.

2. Respondent admits the allegations of paragraph 2 of the complaint.

3. Respondent denies the allegations of paragraph 3 of the complaint.

4. Respondent admits the allegations of paragraph 4 of the complaint, except for the allegation that "[s]uch poles are used for purposes of wire communications." Some of

Respondent's poles are used for wire communications, but many are not.

5. Respondent admits the allegation in paragraph 5 of the complaint that the Florida Supreme Court has held that regulation of pole attachments is outside of the Florida Public Service Commission's current jurisdiction. Respondent is without knowledge or information sufficient to form a belief as to the remainder of paragraph 5.

6. Respondent admits the allegations of paragraph 6 of the complaint.

7. Respondent admits the allegations of paragraph 7 of the complaint.

8. Respondent denies the allegations of paragraph 8 of the complaint. Rather than "attempting to charge" Complainants an annual rental of $6.24 per pole in 1980, Respondent charged that rate in 1980 and currently charges $6.51 per pole pursuant to contractual agreement with Complainants.

9. Respondent admits the allegations of paragraph 9 of the complaint, except for the allegation that Complainants sought to determine the "lawfulness" of Respondent's rate, which is denied.

10. Respondent denies the allegations of paragraph 10 of the complaint.

11. Respondent admits the first sentence of paragraph 11 of the complaint, except for the use of the term "maximum lawful rate," and denies the remainder of the paragraph.

12. Respondent denies the allegations of paragraph 12 of the complaint.

13. Respondent denies the allegations of paragraph 13 of the complaint.

14. Respondent denies the allegations of paragraph 14 of the complaint.

15. Respondent denies the allegations of paragraph 15 of the complaint.

16. Respondent denies the allegations of paragraph 16 of the complaint.

17. Respondent denies the allegations of paragraph 17 of the complaint.

18. Respondent denies the allegations of paragraph 18 of the complaint.

19. Respondent denies the allegations of paragraph 19 of the complaint. Rather than "attempting to charge" Complainants a one-time rental rate of $16.50 per anchor attachment, Respondent currently charges that fee pursuant to contractual agreement.

20. Respondent admits the allegations in paragraph 20 of the complaint that the pole attachment agreement provides for annual rental increases and for a bonding payment. Respondent is without knowledge or information sufficient to form a belief as to the allegation that Complainants are established and reliable corporations. Respondent denies the remainder of paragraph 20.

21. Respondent denies the allegations of paragraph 21 of the complaint.

II. Affirmative Defenses

22. The Commission should not grant the relief requested because:

A. Congress did not grant the Commission authority to amend, modify or abrogate pole attachment contracts in existence prior to the effective date of the Communications Act Amendments of 1978, such as the agreement at issue between Complainants and Respondent.

B. The relief requested would constitute a taking of private property without just compensation prohibited by the Fifth Amendment of the United States Constitution. The well-established legality of governmental regulation of rates charged for Respondent's provision of electric service in no way alters the unconstitutionality of the proposed governmental intrusion upon Respondent's use of private property for a distinct and heretofore unregulated business purpose.

C. The relief requested would retroactively nullify the terms of a contract in existence prior to the effective date of the Communications Act Amendments of 1978, and thereby would constitute a deprivation of property without due process prohibited by the Fifth Amendment of the United States Constitution.

As discussed in paragraph 41 below, Respondent requests that a briefing schedule be set for each of the above defenses.

III. Calculation of Pole Attachment Rates and Conditions

23. Notwithstanding Respondent's overriding objections to Complainants' request for replacement of the contractual rental rate with a rate determined by the Commission, Respondent has calculated a rate in accordance with the Commission guidelines announced in *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585 (1978), 72 F.C.C.2d 59 (1979), 77 F.C.C.2d 187 (1980), and applied in the resolution of certain other pole attachment disputes.

24. Attached hereto as Exhibit A is the Affidavit of Gary E. Clayton, Manager for Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Affidavit"). The rate derivation methodology explained in detail in the Affidavit differs in only a few respects

from the methodology used in the complaint. Actual figures used differ in many instances because of Respondent's access to more specific and more recent historic figures. The variations from Complainants' methods and figures have resulted in rate components both more and less favorable to Respondent than those presented in the complaint.

25. Like Complainants, Respondent begins its rate calculation with gross pole investment. Where Complainant uses the figure reported on Respondent's Annual Report to the Federal Energy Regulatory Commission ("FERC Form 1") for the year ending December 31, 1979, Respondent uses the more recent, though still historic, figure which will appear on the FERC Form 1 for the year ending December 31, 1980. Complainants then arrive at net investment by subtracting a depreciation reserve figure derived from total plant statistics. Respondent instead subtracts the actual pole depreciation reserve figure on its books as of December 31, 1980. See Affidavit paragraph 7.

26. Complainants adjust the net pole investment figure by subtracting 15%, representing an estimate of the investment in items not essential to CATV attachments. Respondent finds the subtraction of investment in items not essential to CATV attachments arbitrary and unreasonable. Net pole investment, without subtractions, should be the base figure from which the cable attachment rental rate is derived. Indeed, 47 U.S.C. 224(d)(1) speaks of costs "attributable to the entire pole," not to the "bare pole." Respondent for the purpose of this calculation deducts 15% from net pole investment in accordance with the Commission determination in *Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia*, 47 R.R.2d 1407, 1410 (1980), but in no way accepts the validity of this approach.

27. Unable to take the next step in the analysis, the division of net pole investment by the number of poles owned by Respondent, Complainants assume that Respondent's net investment per pole is no greater than that of the General Telephone Company of Florida. This assumption results in Complainants' use of the grossly inaccurate figure of $57.18. By dividing net investment by the actual number of poles owned, 524,044, Respondent arrives at a net investment per pole of $96.75. See Affidavit paragraph 8.

28. Complainants and Respondent look at the same components in calculating carrying charges: cost of capital, maintenance expenses, administrative expenses, depreciation and taxes.

29. Complainants simply estimate the cost of capital at 10%. Respondent instead calculates the actual cost of capital in compliance with the Florida Public Service Commission method. See Affidavit paragraph 10.

30. Complainants begin their calculation of maintenance expenses with the FERC 593 (overhead lines maintenance) account reported in Respondent's FERC Form 1 for the year ending December 31, 1979. Respondent instead uses the FERC 593 account which will appear on the FERC Form 1 for the year ending December 31, 1980. To express maintenance expenses as a percentage of gross investment, Complainant divides the FERC 593 account by the FERC 364 (poles, towers and fixtures) account. Respondent matches expenses to plant more precisely by dividing the FERC 593 account by both the FERC 364 and the FERC 365 (overhead conductors and devices) accounts. Where Complainants' method results in a maintenance expenses rate for gross investment of 11.89%, Respondent's method results in a rate of 6.35%. To convert maintenance expenses from a percentage of gross pole investment to a percentage of net pole investment, Complainants use the same gross pole investment and pole depreciation reserve

figures used in calculating net pole investment. As explained in paragraph 25 above, Respondent uses more recent and directly relevant figures. Respondent arrives at a maintenance expenses rate for net investment of 9.48%. Had Respondent divided the FERC 593 account by the FERC 364 account alone, the maintenance expenses rate for net investment would have been 17.7%. See Affidavit paragraph 11.

31. Like Complainants, Respondent begins the calculation of pole administrative expenses by assuming that these expenses bear the same relation to pole investment as plant administrative expenses bear to total plant investment. However, Respondent's calculations differ from Complainants' in two ways. First, Respondent again uses updated statistics, in this case the plant administrative expenses and plant investment figures which will appear on the FERC Form 1 for the year ending December 31, 1980. Second, Respondent uses gross pole investment and net pole investment figures to convert administrative expenses from a percentage of gross investment to a percentage of net investment. Respondent makes assumptions based on total plant statistics only when necessary: since the ratio of gross pole investment to net pole investment is available, Respondent uses that ratio as a conversion factor. See Affidavit paragraph 12.

32. Respondent uses the same formula as the Complainants for deriving the depreciation rate for gross investment. Where Complainants assume a useful life of 30 years, however, Respondent applies the 22 year average life authorized for FERC account 364 by the Florida Public Service Commission. Again, Respondent uses more recent and directly relevant gross pole investment and net pole investment figures than those found in the complaint. See Affidavit paragraph 13.

33. Complainants calculate taxes as a percentage of net investment in the same way as they calculate administrative expenses. Similarly, Respondent calculates taxes other than state and federal taxes in the same way as it calculates administrative expenses. The differences between the two approaches have been explained in paragraph 31 above. See Affidavit paragraph 15.

34. Respondent's method of calculating state and federal income taxes departs entirely from the Complainants' tax calculation method. Respondent's methodology is in accordance with the methodology used by the Florida Public Service Commission, and avoids the often misleading results of the Complainants' method. Explained in many sources, including American Telephone and Telegraph Company, *Engineering Economy*, 174-79 (3d ed. 1977), Respondent's methodology is conceptually similar to the approach accepted in another pole attachment proceeding, *TeleCable Development Corporation v. Appalachian Power Company*, No. 79-0007, ¶ 19 (Common Carrier Bureau, October 31, 1980). See Affidavit paragraph 14.

35. Respondent's calculations result in a net investment per pole of $96.75 and carrying charges of 33.7%. To complete the calculation, the additional factor of usable space attributable to cable use must be supplied.

The Commission has ruled that cable uses no more than 1 foot of space, and that usable space must include all safety spaces between users. It is respectfully submitted that in defining "usable space" to include safety spaces between users while allowing attribution of no more than one foot of usable space to CATV users, the Commission has misconstrued Congressional intent and dictated the calculation of pole attachment rates which are neither just nor reasonable.[1] As paragraphs 20 and 21 of the Affidavit

[1] Respondent notes the particular injustice of Commission reliance on agreements which "generally make the CATV operators responsible for all pole replacement costs necessitated by subsequent installation of additional electric or telephone lines that reduce available safety space to less than 40 inches." *Adoption of Rules for the Regulation of Cable*

show, if the Complainants owned their own pole system they would incur considerably higher annual costs—even if they shared those costs with another user—than they now pay Respondent. Where more equitable allocation of "usable space" to CATV would result in a finding that Respondent's current rates are just and reasonable, the Commission's interpretation results in the finding that a rate which already provides Complainants a bargain must be drastically reduced. This reduction would come at the expense of utility users. Through its "usable space" decisions, therefore, the Commission has brushed aside significant countervailing public interests in a single-minded effort to grant CATV companies every conceivable advantage.

36. If a use ratio of 7.41% is employed to complete a calculation of the rental rate consistent with all of the Commission's interpretations, the resulting annual rental rate per pole is $2.42, as compared to the $1.38 requested by the complaint.

37. An annual rate of $9.63 per pole would be a just and reasonable charge for Complainants' use of Respondent's poles. Respondent has developed this rate by positing the existence of a pole system owned by Complainants and multiplying conservative estimates of the net investment per pole and carrying costs that system would require. Assuming that Complainants could find another user to share pole costs equally, Complainants would pay an annual rate of $9.63 per pole if they owned their own pole system. See Affidavit paragraphs 20-21. That Complainants now pay a far lower rate under the terms of the agreement reached with Respondent illustrates the justice of the contractual rate and the injustice of Complainants' request for Commission imposition of a still lower rate. It is only fair and just for Respondent's utility cus-

Television Pole Attachments, 72 F.C.C.2d at 71. Respondent's contractual agreements with Complainants contain no such provisions.

tomers to share in the savings Complainants derive from using Respondent's pole system rather than maintaining their own.

38. Because an anchor attachment is not an "attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility," the Commission does not have jurisdiction under 47 U.S.C. § 224 to pass upon Complainants' challenge of the reasonableness of Respondent's anchor attachment rates. Nonetheless, Respondent feels compelled to remark on the irony of Complainants' questioning of anchor attachment rates. As the Affidavit states, Respondent rents anchors to Complainants only because the unauthorized and potentially unsafe use of anchors by Complainants left Respondent no choice aside from forcible removal. Respondent would be pleased to relieve Complainants of this "onerous" charge by ceasing rental of anchors to CATV companies.

39. As exemplified by the Complainants' unauthorized use of Respondent's anchors, the history of Respondent's dealings with CATV companies shows the bonding payment required of such companies to be just, reasonable, and essential.

IV. Procedural Requests

40. Respondent requests that the Commission stay any further action in connection with the complaint in this case until the U.S. Court of Appeals for the D.C. Circuit has entered a decision on the pending appeal, Nos. 80-1483, 80-1490, 80-1499, of the Commission's *Adoption of Rules for the Regulation of Cable Television Pole Attachments, supra*. Like this response, the appeal of the Commission's Rules has focused upon the Commission's assertion of jurisdiction to abrogate pre-existing pole attachment agreements and determination that the CATV operator may be charged with only one foot of pole space. Should the D.C. Circuit find merit in the appeal, a previous disposition of the instant complaint would stand to be largely superseded

or entirely invalidated. A stay therefore would avoid needless waste of the Commission's resources. Upon Commission grant of a stay, the Respondent will reserve sufficient funds to meet the relief requested by the complaint.

41. Respondent requests that the Commission stay any further action in connection with the complaint in this case until the Florida legislature has acted upon a bill which would grant the Florida Public Service Commission authority to regulate pole attachments. Such a bill will be filed with the Florida legislature within the next month for consideration at its next session. Passage of this legislation, followed by Florida Public Service Commission certification to the Federal Communications Commission, would leave the latter without jurisdiction to enforce any relief ordered in response to the complaint. *Adoption of Rules for the Regulation of Cable Television Pole Attachments, supra*, 73 F.C.C.2d at 61. Rather than risk such a waste of its time and effort, the Federal Communications Commission should await the Florida legislature's decision. No harm would come to Complainants because Respondent would reserve funds as described in paragraph 40.

42. Respondent requests a briefing session for the presentation of arguments supporting the legal points stated in paragraph 22. Points B and C have not been brought before the Commission in previous pole attachment proceedings. Respondent also stands ready to brief Point A.

43. Respondent requests an evidentiary hearing on the question of the applicability of 47 U.S.C. § 224 and Sections 1.1401-.1415 of the Commission's rules to anchor attachments. Respondent submits that an anchor attachment is not an "attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility."

44. Respondent requests authority to conduct limited discovery designed to illuminate the likely effects of the several remedies requested by Complainants. If the Commission determines that Respondent's rates, terms, or conditions are not just and reasonable, Section 1.1410 of the Commission's Rules does not mandate any specific remedy, but rather allows a variety of remedies. The Commission has made liberal use of these remedies in the few pole attachment complaints it has decided. *See, e.g., Teleprompter of Fairmont, supra.* Respondent submits that the decision to "[o]rder a refund, or payment, if appropriate," § 1.1410(c), for example, should rest on a determination that a furtherance of the Congressional aims underlying Section 224 will result. In adopting 47 U.S.C. § 224, Congress hoped "to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 95-580, 95th Cong. 1st Sess. 14 (1977). It is fully possible that some or all of the remedies the Commission could order would serve only to transfer income from the Respondent's utility users to the Complainants without any beneficial effects on cable television service. Respondent hopes to learn more about the role of pole attachment costs in Complainants' business by inspecting records required by Section 76.305 of the Commission's Rules to be available for public inspection. Nonetheless, only discovery will enable Respondent and the Commission to gauge accurately the likely public benefits, if any, of the remedies sought by Complainants.

45. If the Commission should decide to modify the rental rates provided for in the contract, then Respondent requests that the Commission serve a copy of any final action in this case upon each local body regulating Complainants' cable activities within the geographical area specified in the complaint. The Commission might thereby increase the possibility that any increased revenue received by Complainants would not merely be profit for Complainants, but might also be passed on to Complainants' customers.

Respectfully submitted,

FLORIDA POWER CORPORATION

By /s/ ALLAN J. TOPOL
ALLAN J. TOPOL

/s/ MICHAEL S. BERNSTEIN
MICHAEL S. BERNSTEIN

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January 21, 1981

STATE OF FLORIDA)
COUNTY OF PINELLAS)

File No. PA-81-0008

AFFIDAVIT OF GARY E. CLAYTON

BEFORE ME, the undersigned authority, on this day personally appeared GARY E. CLAYTON, who, after being sworn, deposes and says:

1. My name is Gary E. Clayton. My business address is 3701 34th Street South, St. Petersburg, Florida. I am the Manager for Liaison and Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Florida Power").

2. I hold a Bachelor's degree in Electrical Engineering from the Georgia Institute of Technology, Atlanta, Georgia. I have been employed by Florida Power for the past ten years. My experience in that time has included two years in the area of distribution engineering, five years in the area of transmission engineering, and three years in my present position in the Real Estate Department. As Manager for Joint Use Affairs, I am responsible for developing appropriate pole attachment charges and negotiating the terms of pole attachment contracts.

3. I have read and am familiar with (a) Sections 1.1401 through 1.1415 of the Rules and Regulations of the Federal Communications Commission, and (b) the Complaint filed by Teleprompter Corporation and Teleprompter Southeast, Inc. ("Teleprompter") against Florida Power, File No. PA-80 ____. In accordance with Section 1.1407(a), I am making this affidavit for filing as a part of the Response of Florida Power to such Complaint.

4. I have also read the Response of which this affidavit is a part, and I am familiar with the matters contained therein insofar as the Response concerns the rates, terms and conditions of pole attachment agreements to which Florida Power is a party. The facts set forth in such Response and in this affidavit are true and correct to the best of my knowledge and belief.

5. I have obtained all of the data relating to Florida Power operations in this affidavit from the Florida Power Economic Research Group.

6. I have calculated two annual pole attachment rates. The first, determined in accordance with relevant Commission *Reports and Orders* and *Memorandum Opinions and Orders*, is $2.42. The second, determined in accordance with the Florida Power conception of a fair and just rate, is $9.63. Paragraphs 7-18 below explain the derivation of the first rate. Paragraphs 7-17 and 19-21 below explain the derivation of the second rate.

7. As of December 31, 1980, Florida Power gross pole investment was $88,975,480, and pole depreciation reserve was $29,327,582. The first figure will appear under account 364 on Florida Power's Annual Report for 1980 to the Federal Energy Regulatory Commission ("FERC Form 1"). Net pole investment, expressed as gross pole investment less pole depreciation reserve, equalled $59,647,898. Subtraction of 15% of net pole investment to account for investment not essential to CATV results in net bare pole investment of $50,700,713.

8. Florida Power owned 524,044 poles as of November 30, 1980. Its tabulation of poles as of December 31, 1980 has not yet been concluded. Net investment per pole, expressed as the quotient of net investment divided by the number of poles owned by the Florida Power Corporation, was $96.75.

$$\frac{\text{Net Pole Investment}}{\text{Number of Poles}} = \$96.75 = \text{Net investment per pole}$$

9. The carrying charge is composed of the cost of capital, maintenance expenses, administrative expenses, depreciation, federal and state income taxes, and other taxes. All components are reported as of December 31, 1980. All carrying charges are expressed as a percentage of net pole investment. Net pole investment percentages are calculated by multiplying gross pole investment percentages by 1.4917, the ratio of gross pole investment to net pole investment.

$$\frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = 1.4917$$

10. The cost of capital (return) is the imbedded cost of capital computed by Florida Public Service Commission method. The figure includes a debt component (long term debt and customer deposits at imbedded rates), an equity component (preferred stock at the imbedded rate and common stock at the allowed 14.6%), and an interest-free component which represents interest-free capital resulting from the deferral of federal income taxes.

Return (Cost of Capital)	% of Capital		Cost of Capital
Long-term Debt	.4567	at	8.81%
Preferred Stock	.1086	at	8.30%
Common Stock	.2929	at	14.6 %
Cost Free Deferred Tax Credits	.1280	at	0 %
Customer Deposits—Active	.0136	at	8 %
Customer Deposits—Inactive	.0002	at	0 %
Composite Cost of Capital			9.31%

11. The maintenance expenses component equals the FERC 593 account divided by the corresponding gross investment in the FERC 364 and 365 accounts and mul-

tiplied by the gross pole/net pole investment conversion ratio. These FERC accounts will appear on Form 1 for 1980.

$$\frac{\text{FERC 593 account}}{\text{FERC 364 \& 365 accounts}} = \frac{\$10{,}581{,}432}{\$166{,}512{,}636} = 6.35\% = \text{Maintenance expense rate for gross investment}$$

$$6.35\% \times 1.4917 = 9.48\% = \text{Maintenance expense rate for net investment}$$

12. Calculation of administrative expenses begins with the division of total administrative expenses by gross plant investment. Because of the lack of more specific data, the analysis to this point assumes pole administrative expenses are to gross pole investment as total administrative expenses are to gross plant investment. In converting a gross administrative expense rate per pole to a net administrative expense rate per pole, however, such an assumption is no longer necessary. Instead of using a gross plant/net plant investment conversion ratio, a gross pole/net pole investment ratio is used. Both the total administrative expenses and the gross plant investment figures will appear on the FERC Form 1 for 1980.

$$\frac{\text{Total administrative expenses}}{\text{Gross plant investment}} = \frac{\$29{,}943{,}156}{\$2{,}073{,}396{,}138} = 1.44\% = \text{Administrative expense rate for gross investment}$$

$$1.44\% \times 1.4917 = 2.15\% = \text{Administrative expense rate for net investment}$$

13. The depreciation rate is calculated for straight-line depreciation as the quotient of 1 minus salvage value divided by the average life of 22 years authorized for FERC account 364 by the Florida Public Service Commission.

$$\frac{1 - \text{salvage value}}{22} = \text{Depreciation rate for gross investment}$$

$$\frac{1 - 0}{22} = 4.55\%$$

$$4.55\% \times \text{Ratio} = \text{Depreciation rate for net investment}$$

$$4.55\% \times 1.4917 = 6.79\%$$

14. The federal and state income tax component equals the income tax paid on the equity portion of the return on investment. The income tax includes the levelized effect of both current and deferred taxes as required under full normalization accounting. The benefits of deferred taxes have been recognized in the calculation of the returr [*sic*] of the required return on capital has been reduced by including the interest-free capital component of deferred taxes. The calculation of income taxes below is consistent with the Florida Public Service Commission method, and uses standard levelized fixed charge rate equations for income tax.

Federal and state income tax rate = .487

Debt/equity ratio = .4703

Composite cost of debt = 8.79

Composite cost of capital = 9.31

A/P = Capital recovery

Average life = 22

Depreciation rate for gross investment = 4.55%

$$\text{Income Tax} = \left(\frac{.487}{1 - .487}\right)\left(1 - \frac{(.4703)\,(8.79)}{9.31}\right)\left((\text{A/P}, 9.31\%\ 22\ \text{Years}) - 0.455\right)$$

Income Tax = 3.32%

15. The "other" taxes for net investment are derived in the same way as administrative expenses. The calculation begins with the "other" tax total, comprised largely

of property taxes and gross receipts taxes, which will be reported on account 408.10 of the FERC Form 1 of 1980. That figure, less franchise fees, is then divided by the gross plant investment figure which will be reported on the same FERC Form and multiplied by the more specific gross pole/net pole investment conversion ratio.

$$\frac{\text{Other taxes (except for franchise fees)}}{\text{Gross Plant Investment}} = \frac{\$36,940,257}{\$2,078,396,138} = 1.78\%$$

= Other tax rate for gross investment

1.78% x 1.4917 = 2.65% = Other tax rate for net investment

16. Total carrying charges, 33.70%, equal the sum of the individual components derived above in paragraphs 10-15:

	% of Net Pole Cost
Return (Cost of Capital)	9.31
Maintenance Expenses	9.48
Administrative Expenses	2.15
Depreciation	6.79
Federal & State Income Taxes	3.32
Other Taxes	2.65
Total	33.70

17. The annual revenue requirement per pole is derived by multiplying the net investment per pole figure in paragraph 8 by the carrying charges percentage in paragraph 16.

$96.75 x 33.7% = $32.60 = Annual revenue requirement per pole

18. If the annual revenue requirement per pole were to be multiplied by 7.41%, the annual pole attachment rental rate would be $2.42.

19. The present pole attachment rate of $6.51 is fair and just. It is much lower than the annual pole cost Teleprompter would incur if it owned its own pole system.

20. It is reasonable to assume that a Teleprompter-owned pole system would resemble closely a telephone-owned pole system, since both only require poles of minimal height. Exhibit C, paragraph 2 of the Complaint shows a General Telephone Company of Florida net investment per pole of $57.18. The carry costs for telephone pole systems generally exceed those for the Florida Power system. Accordingly, a conservative estimate of the carrying cost percentage for a Teleprompter-owned system equals the figure derived above for Florida Power. Multiplying net investment per pole by carrying costs yields an annual pole cost for a Teleprompter-owned system of $19.27.

$57.18 x 33.7% = $19.27

21. If Teleprompter were to share equally the cost of its pole system with another user, the annual cost for each party would be $9.63, still well above the rate Teleprompter pays to Florida Power. Florida Power, far from abusing its bargaining power, charges Teleprompter less than half of the rate Teleprompter would pay annually for its own system.

22. All CATV rental payments are deposited in a general fund which helps to reduce the overall rate base paid by the utility customer. To require Florida Power to lower its pole rental rates, therefore, would increase the already substantial savings to CATV companies at the expense of utility customers.

23. Teleprompter's anchor attachments are not attachments to poles, ducts, conduits or rights of way owned or controlled by Florida Power.

24. For safety reasons, Florida Power does not encourage the use of its anchors by CATV companies. After discovering more than 1000 unauthorized Teleprompter anchor attachments, Florida Power reached a contractual agreement for anchor rentals as an alternative to forcibly removing the attachments.

25. Florida Power requires bonding payments from all cable companies renting pole attachments. Past experience with such companies proves the necessity for the protection bonding payments provide.

Signed this 16th day of January, 1981.

/s/ GARY E. CLAYTON
GARY E. CLAYTON

Sworn to and subscribed before me
this 16th day of January, 1981.

/s/ Illegible
Notary Public

My Commission Expires:
June 15, 1982

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Response" have been mailed, postage prepaid, this 21st day of January, 1981, to the following:

GARDNER F. GILLESPIE, ESQ.
HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006
Attorney for Complainants

Florida Public Service Commission
Commission Clerk
101 East Gaines Street
Tallahassee, Florida 32301

Federal Energy Regulatory Commission
825 North Capitol Street, N.W.
Washington, D.C. 20426

/s/ MICHAEL S. BERNSTEIN
MICHAEL S. BERNSTEIN

January 21, 1981

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

File No. PA-81-0023

In the Matter of

ACTON CATV, INC. d/b/a
BROOKSVILLE PROPERTIES VENTURE
and PASCO ASSOCIATES VENTURE,
Complainant,

v.

FLORIDA POWER CORPORATION,
Respondent.

TO: The Common Carrier Bureau

COMPLAINT

Parties

1. Complainant Acton CATV, Inc. d/b/a Brooksville Properties Venture and Pasco Associates Venture owns and operates the cable television systems presently serving the communities of Brooksville and Pasco County, Florida. The address of Acton CATV, Inc.'s headquarters is One Acton Place, Acton, Massachusetts 01720.

2. Respondent Florida Power Corporation is engaged in the provision of electrical service in portions of the State of Florida. Respondent's general office is P.O. Box 33101, St. Petersburg, Florida 33733.

Jurisdiction

3. This Commission has jurisdiction over this complaint and over Respondent under the provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*, including, but not limited to, Section 224 thereof.

4. Respondent owns or controls utility poles in Florida. Such poles are used for purposes of wire communications. Complainant alleges, upon information and belief, that Respondent is not owned by any railroad, any person who is cooperatively organized, or any person owned by the federal government or any state.

5. Complainant alleges, upon information and belief, and in reliance upon lists published by the Commission pursuant to 47 C.F.R. § 1.1414(b), that neither the State of Florida nor any of its political subdivisions, agencies, or instrumentalities, has certified to the Commission that it regulates the rates, terms, or conditions of pole attachments.

Service

6. Attached hereto is a certificate of service on the Respondent and each federal, state, and local agency which regulates any aspect of service provided by Respondent.

Agreement

7. Complainant has entered into agreement with Respondent whereby it was agreed that space would be made available on Respondent's poles in and in the vicinities of Brooksville and Pasco County, Florida for pole attachments as defined in 47 C.F.R. § 1.1402(b). Those Agreements, dated June 16, 1980, are attached hereto as Exhibits A and B. Pursuant to those agreements, Complainant is charged an annual rental of \$7.15 per pole. Exhibit A at Section 7.1; Exhibit B at Section 7.1. As of November, 1980, there were 5,080 (Brooksville—988; Pasco County—4,092) Florida poles subject to the two Agreements.

Unjust and Unreasonable Rate

8. Respondent is thus currently attempting to charge Complainant an annual rate of \$7.15 per pole in areas

presently served. As will be demonstrated below, under the formula made applicable by Section 224(d)(1) of the Commissions Act and Section 1.1409(c) of the Commission's Rules and Regulations, the maximum lawful rate Respondent may charge is $2.23.

9. In order to determine the lawfulness of Respondent's rate, Complainant relies to some extent on data set forth in the affidavit of Gary E. Clayton, which is appended to the Response of Florida Power Corporation in the case of *Teleprompter Corporation and Teleprompter Southeast, Inc. v. Florida Power Corporation*, File No. PA-81-0008. That Response, dated January 21, 1981, is attached hereto as Exhibit C. Complainant also relies, as indicated herein, on publicly available data in Respondent's 1979 Annual Report to the Federal Energy Regulatory Commission (FERC), Form 1.

10. By statute, the maximum lawful rate is determined by multiplying the "revenue requirement" of each pole (*i.e.*, the operating expenses and capital costs attributed to each bare pole installed) times the "use ratio" for cable television (*i.e.*, the percentage of total usable space occupied by the pole attachment). These figures are developed in summary form in Exhibit D, and they are explained herein.

11. The first step in determining the maximum lawful rate is the calculation of the annual revenue requirement per bare pole. This annual revenue requirement consists of the product of the net investment per bare pole times the annual carrying charges attributable to each pole.

12. The net investment in poles consists of the difference of the gross pole investment and the pole depreciation reserve, and the net investment in bare poles is obtained by reducing this figure by 15 percent in order to remove net investment in crossarms and other equipment not used or useful for pole attachments. The net investment in bare poles, in turn, must be divided by the number of poles

owned by Respondent in order to yield the net investment per bare pole. For purposes of calculation, Complainant will rely on Respondent's figures in Exhibit C. The calculations are set forth in Exhibit D.

13. In order to calculate the revenue requirement per pole, the net investment in each must be multiplied by an annual carrying charge, which consists of all operating expenses and capital costs properly attributable to such poles. Both the Congress and the Commission have determined that the carrying charge includes maintenance expenses, depreciation, administrative expenses, taxes, and cost of capital. Sen. Rep. 95-580, 95th Cong. 1st Sess. 20 (1977); *Teleprompter of Fairmont, Inc.* v. *Chesapeake and Potomac Telephone Co. of West Virginia*, 79 F.C.C.2d 232 (1980).

14. The maintenance expenses, expressed as a percentage of net investment in poles, may be obtained by dividing the pole and conductor maintenance expenses by the net pole investment plus net conductor investment. For purposes of calculation Complainant relies on Respondent's pole and conductor maintenance expense as set forth in Exhibit C. Net pole investment consists of the difference of gross pole investment minus pole depreciation reserve, and net conductor investment consists of the difference of gross conductor investment minus conductor depreciation reserve. The calculations, which yield 8.69%, are set forth in Exhibit D.

15. Assuming, as Respondent indicates in Exhibit C, that the average useful life of a utility pole is 22 years, the depreciation rate, as adjusted for application to net investment, is 6.79%. *See* Exhibit D. With regard to administrative expenses, Complainant relies for purposes of calculation on Respondent's figure for total expenses as set forth in Exhibit C. The calculations, which yield 1.8%, are set forth in Exhibit D. The taxes paid, as indicated

in Respondent's FERC Form 1, are expressed as a percentage of net plant investment, 4.51%.

16. As set forth in Exhibit C, Respondent's figure for composite cost of capital is 9.31%. Adding this figure to the other elements of the annual carrying charge yields a sum of 30.10%. *See* Exhibit D. The product of this figure times the net investment per bare pole constitutes the revenue requirements per bare pole.

17. To calculate what share of that revenue requirement Respondent may charge to cable systems, it is necessary to determine two factors: the space used for a cable attachment and the average usable space per pole. As the Commission has found, there is no dispute that a CATV cable actually uses or occupies one foot of space. *Memorandum Opinion and Second Report and Order in CC Docket 78-144*, 72 F.C.C.2d 59, 70 n.26 (1979), *aff'd on reconsideration*, 77 F.C.C.2d 187, 190 (1980). No safety zones or other clearances may properly be assigned to the cable operator. 72 F.C.C.2d at 70. Dividing the space occupied by the cable attachment, one foot, by the total usable space, 13.5 feet, yields a use ratio of 1/13.5, or 7.41%. This figure is the same as that used by Respondent in Exhibit C.

18. Therefore, multiplying the net investment per bare pole ($96.75) times the annual carrying charge (30.10%) times the use ratio (7.41%) yields the maximum lawful rate ($2.23) permissible under 47 U.S.C. § 224(d)(1). *See* Exhibit D. Any rate charged by Respondent in excess thereof is unjust and unreasonable and therefore unlawful.

19. As set forth above, and as reflected in the pole agreement attached as Exhibit A, Respondent presently charges a rate of $7.15. Complainant submits that such a rate is unlawful in that it exceeds the calculated maximum lawful rate of $2.23.

Unreasonable Terms and Conditions

20. Respondent also has attempted to impose unreasonable and illegal terms and conditions on Complainant in Respondent's pole attachment agreements. The agreements require Complainant to "furnish bond . . . to guarantee the payment of any sums which may become due . . .," and the amount of coverage required could rise to as much as $100,000.00. Exhibit A, Section 5.3; Exhibit B, Section 5.3. This bonding requirement is onerous and unnecessary, both because Complainant is an established and reliable corporation and because the semiannual payments under the agreements must be made in advance. Exhibit A, Section 7.1; Exhibit B, Section 7.1.

Relief Requested

21. Complainant respectfully requests that:

(a) the Commission determine that the maximum rate Respondent may lawfully charge is $2.23 per pole per year;

(b) the present rates, being in excess thereof, be terminated pursuant to 47 C.F.R. § 1.1410(a);

(c) the Commission, pursuant to 47 C.F.R. § 1.1410(b), substitute an annual rate of $2.23 per pole in the agreements attached hereto as Exhibits A and B;

(d) Respondent be ordered, pursuant to 47 C.F.R. § 1410(c) to refund to Complainant the amounts Complainant has paid to Respondent in excess of the maximum lawful rate for the period from the date hereof, plus interest.

Respectfully submitted,

ACTON CATV, INC. d/b/a
BROOKSVILLE PROPERTIES VENTURE
and PASCO ASSOCIATES VENTURE

By /s/ Gardner F. Gillespie
Gardner F. Gillespie

By /s/ Paul Glist
Paul Glist

By /s/ Daniel R. White
Daniel R. White

HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Its Attorneys

Dated: February 20, 1981

AFFIDAVIT

STATE OF MASSACHUSETTS)
COUNTY OF MIDDLESEX) SS:

I, Ronald A. Mahon, an officer of Acton CATV, Inc., on oath do state that I have read the foregoing Complaint attached hereto; that I am familiar with the matters contained herein and know the purpose thereof; and that the facts set forth therein are true and correct to the best of my knowledge, information, and belief.

/s/ RONALD A. MAHON

Subscribed and sworn to before me
this 17th day of February, 1981.

/s/ Illegible [SEAL]
Notary Public

My commission expires:
September 28, 1984

ATTACHMENT AGREEMENT BETWEEN FLORIDA POWER CORPORATION AND ACTON CATV, INC. d/b/a BROOKSVILLE PROPERTIES VENTURE

SECTION 0.1 THIS AGREEMENT, made and entered into this 16th day of June, 1980, by and between FLORIDA POWER CORPORATION, a corporation organized and existing under the laws of the State of Florida, herein referred to as the "Electric Company", and Acton CATV, Inc. d/b/a Brooksville Properties Venture, organized and existing under the laws of the State of Massachusetts, herein referred to as the "Television Company".

WITNESSETH:

SECTION 0.2 WHEREAS, the Television Company proposes to furnish cable television distribution service in corporate limits of Brooksville and adjacent areas lying in Sections 14, 15, 16, 21, 22, 23, 26, 27 and 28; Township 22 South, Range 19 East, Hernando County, Florida. [*sic*] and will need to erect and maintain aerial cables, wires and associated appliances throughout the areas to be served and desires to attach such cables, wires and appliances to poles of the Electric Company; and

SECTION 0.3 WHEREAS, the Electric Company is willing to permit, to the extent it may lawfully do so, the attachment of said cables, wires and appliances to its existing poles where, in its judgment, such use will not interfere with its own service requirements, including consideration of economy and safety.

SECTION 0.4 NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties hereto mutually covenant and agree as follows:

EXHIBIT A

ARTICLE I

SCOPE OF AGREEMENT

SECTION 1.1 This agreement shall be in effect in the portions of counties described in Section 0.2 above in which the Electric Company provides electric distribution service.

SECTION 1.2 The Electric Company reserves the right to deny the attachment of cables, wires and appliances to its poles by the Television Company which have been installed for purposes other than or in addition to normal distribution of electric service, including, but not limited to, poles which in the judgment of the Electric Company (i) are required for the sole use of the Electric Company, (ii) would not readily lend themselves to attachments by the Television Company because of interference, hazards, or similar impediments, present or future, or (iii) have been installed primarily for the use of a third party.

SECTION 1.3 Pursuant to the rights provided for in the foregoing section, the Electric Company hereby excludes its poles used to support its transmission lines (lines with voltage in excess of 50 KV between conductors) and concrete poles without special written permission from the Electric Company.

ARTICLE II

PLACING, TRANSFERRING OR REARRANGING ATTACHMENTS

SECTION 2.1 Before making attachment to any pole or poles of the Electric Company, the Television Company shall make application and receive a permit therefor in the form of Exhibit A, attached hereto and made a part hereof. Unless waived in writing by the Electric Company, the Television Company shall commence and complete all attachment work within the time limits set forth in said Exhibit A.

SECTION 2.2 The Television Company shall, at its own expense, make and maintain said attachments in safe condition and in thorough repair, and in a manner suitable to the Electric Company, and so as will not conflict with the use of said poles by the Electric Company, or by other utility companies using said poles, or interfere with the working use of facilities thereon or which may from time to time be placed thereon. The Television Company shall forthwith, at its own expense, upon notice from the Electric Company, remove, relocate, replace or renew its facilities placed on any pole or pole line, or transfer them to substituted poles, or perform any other work in connection with said facilities that may be required by the Electric Company; provided, however, that in cases of an emergency, the Electric Company may arrange to relocate, replace or renew the facilities placed on said poles by the Television Company, transfer them to substituted poles, or perform any other work in connection with said facilities that may be required in the maintenance, replacement, removal or relocation of said poles, the facilities thereon or which may be placed thereon, or for the service needs of the Electric Company, and the Television Company shall, on demand, reimburse the Electric Company for the non-betterment expense thereby incurred. Nothing in this Section shall be construed to relieve the Television Company of maintaining adequate work forces readily at hand to promptly repair, service and maintain the Television Company's facilities where such condition is hindering the Electric Company's operations.

SECTION 2.3 The Television Company's cables, wires and appliances, in each and every location, shall be erected and maintained in accordance with the requirements and specifications of the Electric Company and of the National Electrical Safety Code, or any amendments or revisions of said specifications or code. Drawings marked 1-G-1, 1-H, 1-H-1, 1-I, 1-I-1, 1-J, attached hereto and by this reference thereto incorporated herein, when not otherwise specified by the Electric Company, are descriptive of min-

imum required construction under some typical conditions, and will be amended as related Electric Company specifications are changed.

SECTION 2.4 In the event that any pole or poles of the Electric Company to which the Television Company desires to make attachments are inadequate to support the additional facilities in accordance with the aforesaid specifications, the Electric Company will indicate on said Exhibit A the changes necessary to provide adequate poles and the estimated cost thereof to the Television Company and return it to the Television Company; and if the Television Company still desires to make the attachments and returns the Exhibit marked to so indicate, together with an advance payment to reimburse the Electric Company for the entire estimated non-betterment portion of the cost and expense thereof, including the increased cost of larger poles, sacrificed life value of poles removed, cost of removal less any salvage recovery and the expense of transferring the Electric Company's facilities from the old to the new poles, the Electric Company will replace such inadequate poles with suitable poles. Where the Television Company's desired attachments can be accommodated on present poles of the Electric Company by rearranging the Electric Company's facilities thereon, the Television Company will compensate the Electric Company in advance for the full estimated expense incurred in completing such rearrangements. The Television Company will also in advance reimburse the Owner or Owners of other facilities attached to said poles for any expense incurred by it or them in transferring or rearranging said facilities. Any strengthening of poles (guying) required to accommodate the attachments of the Television Company shall be provided by and at the expense of the Television Company and to the satisfaction of the Electric Company. The Television Company shall not set intermediate poles under or in close proximity to the Electric Company's facilities. The Television Company may, however, request the Electric

Company to set such intermediate poles as the Television Company may desire, and the Electric Company shall have the option to accept or reject such request. If such request is granted, the Television Company shall reimburse the Electric Company for the full cost of setting such pole or poles.

SECTION 2.5 The Electric Company reserves to itself, its successors and assigns, the right to maintain its poles and to operate its facilities thereon in such manner as will best enable it to fulfill its own service requirements, and in accordance with the National Electrical Safety Code or any amendments or revisions of said Code and such specifications particularly applying to the Electric Company hereinbefore referred to. The Electric Company shall not be liable to the Television Company for any interruption to service of the Television Company or for interference with the operation of the cables, wires and appliances of the Television Company arising in any manner out of the use of the Electric Company's poles hereunder.

SECTION 2.6 The Television Company shall exercise special precautions to avoid damage to facilities of the Electric Company and of others supported on said poles, and hereby assumes all responsibility for any and all loss for such damage caused by the Television Company. The Television Company shall make an immediate report to the Electric Company of the occurrence of any damage and hereby agrees to reimburse the Electric Company for the expense incurred in making repairs. Damage to plant or facilities of the Television Company or damage to any appliance or equipment of a subscriber to the Television Company's service, arising from accidental contact with the Electric Company's energized conductors, shall be assumed by the Television Company.

ARTICLE III

EVIDENCE TO OPERATE FROM GOVERNMENT AND MUNICIPAL AUTHORITIES

SECTION 3.1 Notwithstanding the provisions of Section 12.1, the Television Company shall, as conditions precedent to the exercise of any rights granted by this Agreement, submit to the Electric Company: (1) certified copies of all franchises, permits, licenses or certificates of convenience and necessity granted by state and local governmental bodies authorizing the Television Company to erect and maintain its facilities within public streets, highways, and other thoroughfares located within the geographical area described in Section 0.2, and (2) a certified copy of its certificate from the Federal Communication Commission authorizing it to own and operate a cable television system in the geographical area described in Section 0.2.

ARTICLE IV

RIGHT-OF-WAY FOR TELEVISION COMPANY'S ATTACHMENTS

SECTION 4.1 It shall be the sole responsibility of the Television Company to obtain for itself such rights-of-way or easements as may be appropriate for the placement and maintenance of its attachments to the Electric Company's poles located on private property. While the Electric Company and the Television Company will cooperate as far as may be practicable in obtaining rights-of-way for both parties on the Electric Company's poles, no guarantee is given by the Electric Company of permission from property owners, municipalities or others for use of poles and right-of-way easement by the Television Company; and if objection is made thereto and the Television Company is unable to satisfactorily adjust the matter within a reasonable time, the Electric Company may at any time, upon thirty (30) days' notice in writing to the Television Company, require

the Television Company to remove its attachments from the poles involved and the Television Company shall, within thirty (30) days after receipt of said notice, remove its attachments from said poles and its appliances from said right-of-way easement at its sole expense. Should the Television Company fail to remove its attachments and appliances, as herein provided, the Electric Company may remove them without any liability for loss or damage, and the Television Company shall reimburse the Electric Company for the expense incurred.

ARTICLE V

INSPECTION

SECTION 5.1 The Electric Company, because of the importance of its service, reserves the right to inspect each new installation of the Television Company on its poles and in the vicinity of its lines or appliances and to make periodic inspections, semiannually or more often [*sic*] as plant conditions must warrant, of the entire plant of the Television Company; and the Television Company shall, on demand, reimburse the Electric Company for the expense of such inspections. Such inspections, made or not, shall not operate to relieve the Television Company of any responsibility, obligation or liability assumed under this agreement; provided, however, that such inspections, as to payment by the Television Company to the Electric Company, shall be limited to not more than one inspection each calendar year during the period covered by the agreement.

SECTION 5.2 Bills for inspections, expenses and other charges under this agreement, except those advance payments specifically covered herein, shall be payable within thirty (30) days after presentation. Non-payment of bills shall constitute a default of this agreement.

SECTION 5.3 The Television Company shall furnish bond issued by a corporate surety acceptable to the Electric

Company to guarantee the payment of any sums which may become due to the Electric Company for rentals, inspections, or for work performed for the benefit of the Television Company under this agreement including the removal of attachments upon termination of this agreement by any of its provisions, as provided on the attached Schedule of Required Bond Coverage. The Schedule of Required Bond coverage may be subject to revision by the Electric Company from time to time to be consistent with any increases in construction costs or rental attachment rates. The Electric Company will give the Television Company ninety (90) days notification prior to the effective date of any such Schedule revision.

ARTICLE VI

ABANDONMENT AND REMOVAL OF ATTACHMENTS

SECTION 6.1 The Television Company may at any time remove its attachments from any pole or poles of the Electric Company, but shall immediately give the Electric Company written notice of such removal in the form of Exhibit B, attached hereto and made a part hereof. No refund of any rental will be due on account of such removal, nor proration made for less than one-half year.

SECTION 6.2 Upon notice from the Electric Company to the Television Company that the use of any pole or poles is forbidden by governmental authorities or property owners, the permit covering the use of such pole or poles shall immediately terminate and the cables, wires and appliances of the Television Company shall be removed at once from the affected pole or poles.

ARTICLE VII

RENTAL AND PROCEDURE FOR PAYMENTS

SECTION 7.1 The Television Company shall pay to the Electric Company, for attachments made to poles under

this agreement, a rental at the rate of ($7.15) Seven Dollars and 15/100 per pole per year. Said rental shall be payable semiannually in advance on the first day of January and the first day of July of each year during which this agreement remains in effect. Semiannual rental payments shall be based upon the number of poles on which attachments are being maintained on the first day of June and the first day of December immediately preceding the respective due dates for semiannual payments. The first payment of rental hereunder shall include such prorated amount as may be due for use of poles for the period of time from the effective date hereof until the end of the calendar year in which the agreement becomes effective.

SECTION 7.2 If the Electric Company decides to make a field inspection of the entire plant of the Television Company in accordance with Section 5.1 of this Agreement and, further, if the Electric Company finds that the attachment inventory records are in error, then upon completion of such inventory, the office records will be adjusted accordingly and subsequent billing will be based on the adjusted number of attachments. The corrections to the estimations made over the years elapsed since the preceding inventory shall be prorated equally (*i.e.*, if the latest joint field check shows 100 more CATV attachments than office records indicate and if the interval since the last joining field check is 5 years, then each of the intervening annual pole inventory amounts would be adjusted upward by 20 poles). In calculating retroactive billing for the years elapsed since a preceding inventory, full consideration will be given for the cost of money, as experienced by the Electric Company, over that period of time. The prime annual interest rate used in calculating the annual cost of money will be determined by using average annual interest rate, + 2%, for the 7 Southeast centers, Bank rates on short-term business loans, money and interest rates, *Survey of Current Business*, as published by the United States

Department of Commerce/Social and Economic Statistics Administration/Bureau of Economic Analysis.

SECTION 7.3 If for any reason the Television Company is delinquent in the payment of any billings as herein provided by this contract and upon 30 days after receipt of an invoice from Electric Company, the Electric Company can, at its option, charge the Television Company prime annual interest as defined in the aforementioned Section 7.2.

ARTICLE VIII

PERIODICAL REVISION OF ATTACHMENT PAYMENT RATE

SECTION 8.1 The attachment rate set forth in Section 7.1 shall be subject to annual revision at the request of either party made in writing to the other not later than sixty (60) days before the anniversary date of this agreement. If the parties hereto fail to agree upon a revision of such rate prior to said anniversary date, the then attachment rate for each subsequent annual period until further revised, shall be an amount equal to one-half of the current annual cost of installing and maintaining an average attachment pole.

SECTION 8.2 Current annual cost as referred to in Section 8.1 refers to the current carrying charges which would be experienced by the Electric Company by owning, installing and maintaining an average attachment pole and is arrived at by using current costs to install an average attachment pole and then applying a percentage (a fixed charge rate which includes all related costs associated with ownership thereto covering current fixed charges).

SECTION 8.3 An average attachment pole, as referred to in Sections 8.1 and 8.2, is defined to mean the average of a 35-foot and 40-foot pole.

ARTICLE IX
DEFAULTS

SECTION 9.1 If the Television Company shall fail to comply with the provisions of this agreement, including the specifications hereinbefore referred to, or default in any of its obligations under this agreement and such default or non-compliance shall continue for thirty (30) days after notice thereof in writing from the Electric Company to correct such default or non-compliance, all rights of the Television Company hereunder shall be suspended, including its right to occupy the Electric Company's poles and, if such default shall continue for a period of thirty (30) days after such suspension, the Electric Company may, at its option, forthwith terminate this agreement or the permit covering the poles to which such default or non-compliance shall have occurred. In case of such termination, no refund or prepaid rentals shall be made.

ARTICLE X
LIABILITY AND INSURANCE

SECTION 10.1 The Television Company shall assume full responsibility for the attachment of its facilities pursuant to this agreement and will defend and hold the Electric Company harmless against and indemnify it for any and all accidents or damages or claims or costs whatsoever arising within the scope thereof or in carrying out this agreement, irrespective of negligence actual or claimed on the part of the Electric Company. If any member of the public, or any employee or agent of the Television Company, or any employee or agent of a contractor is injured or killed, or if any property including the Electric Company's or the public's is damaged in the course of work being performed under the provisions of this agreement, the Television Company will notify the Electric Company personnel who is inspecting the work, or in his absence,

the Electric Company's supervisor who originated the contract with the Television Company. Such notification will be made immediately in person and or by telephone and promptly confirmed in writing, and will include all pertinent data such as name of injured party, location of accident, description of accident, nature of injuries, names of witnesses, disposition of injured or deceased person.

SECTION 10.2 As a safeguard in respect of Section 10.1 above, the Television Company will carry Workmen's Compensation Insurance in the maximum amounts required by statute and will also carry policies of insurance acceptable to the Electric Company with respect to (a) General Liability with Bodily Injury limits not less than $500,000 each person and $1,000,000 each occurrence and with Property Damage limits not less than $100,000 each occurrence and $200,000 aggregate, and (b) Automobile Liability with Bodily Injury limits not less than $500,000 each person and $1,000,000 each occurrence and with Property Damage limits not less than $100,000 each occurrence. The Television Company will have the insurance policies mentioned in (a) and (b) above, respectively, endorsed by its insurance carrier to provide blanket contractual coverage, expressly with respect to Section 10.1 above, to the full limits of and for the liabilities insured under said policies; and prior to the commencement of any work hereunder, the Television Company will furnish the Electric Company with a certificate, in duplicate, on the Electric Company's Form 908-404(S) completed by the Television Company's insurance carrier showing it carries the requisite insurance and that the specified policies insure the liability assumed by the Television Company under Section 10.1 above.

SECTION 10.3 The Television Company is hereby advised that the generation, transmission and/or distribution of electrical energy involves the handling of a natural force which, when uncontrolled, is inherently hazardous to life and property. The Television Company is further hereby

advised that, due to the nature of the work to be performed hereunder, other hazardous or dangerous conditions (not necessarily related to the inherent danger of electricity) may also be involved in the work. Accordingly, prior to the commencement of the attachment of any cable television facilities to the poles of the Electric Company, the Television Company shall inspect the job site specifically to ascertain the actual and potential existence and extent of any hazardous or dangerous conditions, and instruct its employees with respect to said conditions and the safety measures to be taken in connection therewith; and during the course of the work, the Television Company shall take all such measures as may be deemed necessary or advisable to protect and safeguard the person and property of its employees and of the general public against all hazardous or dangerous conditions as the same arise.

SECTION 10.4 The Television Company and its duly authorized agents and employees shall, before climbing poles or structures, make certain that they are strong enough to safely sustain workmen's weight in the performance of the required work on the poles or structures. All work designated in any Application and Permit under this agreement to be performed near energized electrical conductors shall be performed under the conditions and at the place as stated, but only with the specific understanding that if the Television Company in its sole discretion regards the place where such work is to be performed, or where such work is being performed, as an unsafe place to work, either because the said conductors or other equipment are so energized, or because it is deemed unsafe for any other reason or condition or conditions then and there existing, it shall request the Electric Company for a clearance to de-energize the said conductors or other equipment, or to make such other change or changes as may be necessary or desirable in the Television Company's sole discretion, to render the place of performance at the job site a safe place to work for the Television Company's employees. In

the absence of any request by the Television Company to the Electric Company it shall be conclusively presumed that the place where the work is to be performed is a safe place to work without the de-enerization [*sic*] of such conductors or other equipment, and without making any changes whatsoever at the job site.

ARTICLE XI

EXISTING RIGHTS OF OTHER PARTIES

SECTION 11.1 Nothing herein contained shall be construed to confer on the Television Company an exclusive right to make attachments to the Electric Company's poles in the area covered by this agreement and any supplement thereto, and it is expressly understood that the Electric Company has the unconditional right to permit any other person, firm or corporation to make attachments to the same poles in that area covered in this agreement and supplements thereto. However, under no circumstances will the Electric Company grant permits permitting more than one attachment for cable television distribution service to any pole or pole line.

ARTICLE XII

TERM OF AGREEMENT

SECTION 12.1 This agreement shall become effective upon its execution and if not terminated in accordance with the provisions of Section 9.1 shall continue in effect for a term of not less than one (1) year. Either party may terminate the agreement at the end of said year or at any time thereafter by giving to the other party at least a six (6) months' written notice. Upon termination of the agreement in accordance with any of its terms, the Television Company shall immediately remove its cables, wires and appliances from all poles of the Electric Company. If not so

removed, the Electric Company shall have the right to remove them at the cost and expense of the Television Company and without any liability therefor. The Electric Company shall deliver to the Television Company, or the bonding company, any equipment so removed upon termination of this agreement, upon payment of the cost of removal, cost of storage and delivery, and all other amounts then due the Electric Company.

ARTICLE XIII

ASSIGNMENT OF RIGHTS

SECTION 13.1 The Television Company shall not assign, transfer or sublet the privileges hereby granted without the prior consent in writing of the Electric Company.

SECTION 13.2 No use, however extended, of the Electric Company's poles, under this agreement, shall create or vest in the Television Company any ownership or property rights in said poles, but the Television Company's rights therein shall be and remain a mere revocable license. Nothing herein contained shall be construed to compel the Electric Company to maintain any of said poles for a period longer than demanded by its own service requirements. The Electric Company reserves the right to deny licensing of any poles to the Television Company for any reason whatsoever (within the sole discretion of the Electric Company).

ARTICLE XIV

WAIVER OF TERMS OR CONDITIONS

SECTION 14.1 Failure to enforce or insist upon compliance with any of the terms or conditions of this agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

ARTICLE XV

BONDING TO ELECTRIC COMPANY GROUND

SECTION 15.1 For the purpose of this article, the following terms when used herein shall have the following meaning, to wit:

15.1.1 "Vertical ground wire" shall mean a wire conductor of the Electric Company attached vertically to the pole and extended from the Electric Company's multi-grounded neutral (defined below) through the Television Company's space to the base of the pole where it may be either butt wrapped on the pole or attached to a grounded electrode.

15.1.2 "Multi-grounded neutral" shall mean an Electric Company conductor located in the Electric Company's space which is bonded to all Electric Company vertical ground wires.

15.1.3 "Bonding Wire" shall mean a number 6 AWG copper wire conductor connecting equipment of the Television Company and the Electric Company to the vertical ground wire.

SECTION 15.2 At the time the Television Company cable is installed, the Television Company shall install a "bonding wire" on every pole where a "vertical ground wire" exists. Any piece of television equipment attached to an Electric Company pole which does not have a "vertical ground wire" shall be bonded to the television cable messenger.

SECTION 15.3 Under no condition will the Electric Company's vertical ground wire be broken, cut, severed, or otherwise damaged by the Television Company.

SECTION 15.4 The Electric Company reserves the right to install a "bonding wire" to any piece of television equip-

ment where, in the opinion of the Electric Company, a safety hazard exists or may exist in the future.

SECTION 15.5 It shall be the responsibility of the Television Company to instruct its personnel working on the Electric Company's poles of the dangers involved in bonding its wires to the Electric Company's "vertical ground wire" and associated dangers thereof, and to furnish adequate protective equipment so as to save its personnel from bodily harm. As stated in Article X above, the Electric Company assumes no responsibility either for instructing, for furnishing equipment to, or for the liability involved in the Television Company's personnel working on the Electric Company's poles.

ARTICLE XVI

AUTOMATIC TERMINATION

SECTION 16.1 Notwithstanding the provisions of Section 12.1 of this agreement; it shall be automatically terminated on x x x x x x x x x, 19xx, in the event that the Television Company shall fail to commence making cable attachments on or before that date; it shall be automatically terminated on x x x x x x x x x, 19xx, in the event that the Television Company shall fail to provide television distribution service throughout the area described in Section 0.2 of this agreement on or before that date; it shall be automatically terminated upon expiration, suspension, cancellation or termination of any franchise, license, permit or certificate of convenience and necessity that the Television Company is required by law to obtain and maintain in full force and effect.

Subject to the provisions of Section 13.1 hereof, this agreement shall extend to and bind the successors and assigns of the parties hereto.

ARTICLE XVII

MISCELLANEOUS PROVISIONS

SECTION 17.1 Attorney's Fees. In the event of any litigation between the parties hereto brought to enforce rights granted by this agreement, the prevailing party therein shall be allowed all reasonable attorney's fees expended or incurred in such litigation, in trial and appellate courts, to be recovered as a part of the costs therein.

SECTION 17.2 Venue of Actions. Any and all litigation between the parties hereto arising out of this agreement shall be instituted and maintained in the Circuit Courts for Pinellas County, Florida, with the exception of any cause of action arising by virtue of the laws of the United States, which litigation shall be instituted in the United States District Court, Middle District, Tampa Division.

SECTION 17.3 Controlling Law. This agreement shall be construed and enforced in accordance with the laws of the State of Florida.

ARTICLE XVIII

EXISTING CONTRACTS

SECTION 18.1 This agreement supersedes the existing agreement entered into between the two parties on the x x x day of x x x x x, 19xx.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate, and their corporate seals to be affixed thereto, by their respective officers thereunto duly authorized, on the day, month and year first above written.

Attest:	FLORIDA POWER CORPORATION
/s/ BETTY M. CLAYTON Asst. Secretary	By /s/ NED B. SPARKE Vice President
	ACTON CATV, INC. d/b/a BROOKSVILLE PROPERTIES VENTURE
Attest:	
/s/ Illegible Asst. Secretary	By /s/ Illegible Vice President

SCHEDULE OF REQUIRED BOND COVERAGE

NUMBER OF ATTACHMENTS	AMOUNT OF COVERAGE
0 - 500	$ 5,000
501 - 1,000	10,000
1,001 - 2,000	20,000
2,001 - 3,000	30,000
3,001 - 4,000	40,000
4,001 - 5,000	50,000
5,001 - 6,000	60,000
6,001 - 7,000	70,000
7,001 - 8,000	80,000
8,001 - 9,000	90,000
Over 9,000	100,000

EXHIBIT A

ATTACHMENT RENTAL CONTRACT

AND

FLORIDA POWER CORPORATION

Application and Permit

__________, 19____

____

In accordance with the terms of agreement dated ____

,

19____, application is hereby made for permit to make attachments to Florida Power Corporation poles for installation of cable television facilities as indicated on the attached construction detail drawing/s number/s ________

.

Certified copies of approved construction permits, as may be required by local governmental authority for the facilities indicated on the drawing/s, are attached also. Construction work, as provided for under this "Application and Permit," shall commence within thirty (30) days and be completed within one hundred twenty (120) days of the approval date of this application and permit as set forth below, otherwise this application and permit shall become null and void.

By ______________________________

Title ______________________________

Permit will be granted, subject to your approval of the following changes and rearrangements at an estimated cost to you of $________, payable in advance.

Permit denied under Section 13.2, __________, 19____.

The above changes and rearrangements approved ____, 19____, and advance payment therefor enclosed.

By ______________________

Title ______________________

Permit Approved ______ 19______________________ By ______________________,

Permit No. ______________

Total Previous Attachments ______________________

Attachments This Permit __ Title ______________________

New Total ______________

EXHIBIT B

ATTACHMENT RENTAL CONTRACT

AND
FLORIDA POWER CORPORATION

Notification of Removal by Television Company

__________, 19____

____

In accordance with the terms of the agreement dated __________, 19____, kindly cancel from your records the following poles covered by Permit No. __________, from which attachments were removed on ____, 19____.

Location: City __________ County __________, Florida.

Pole Number — Permit No. — Pole Location

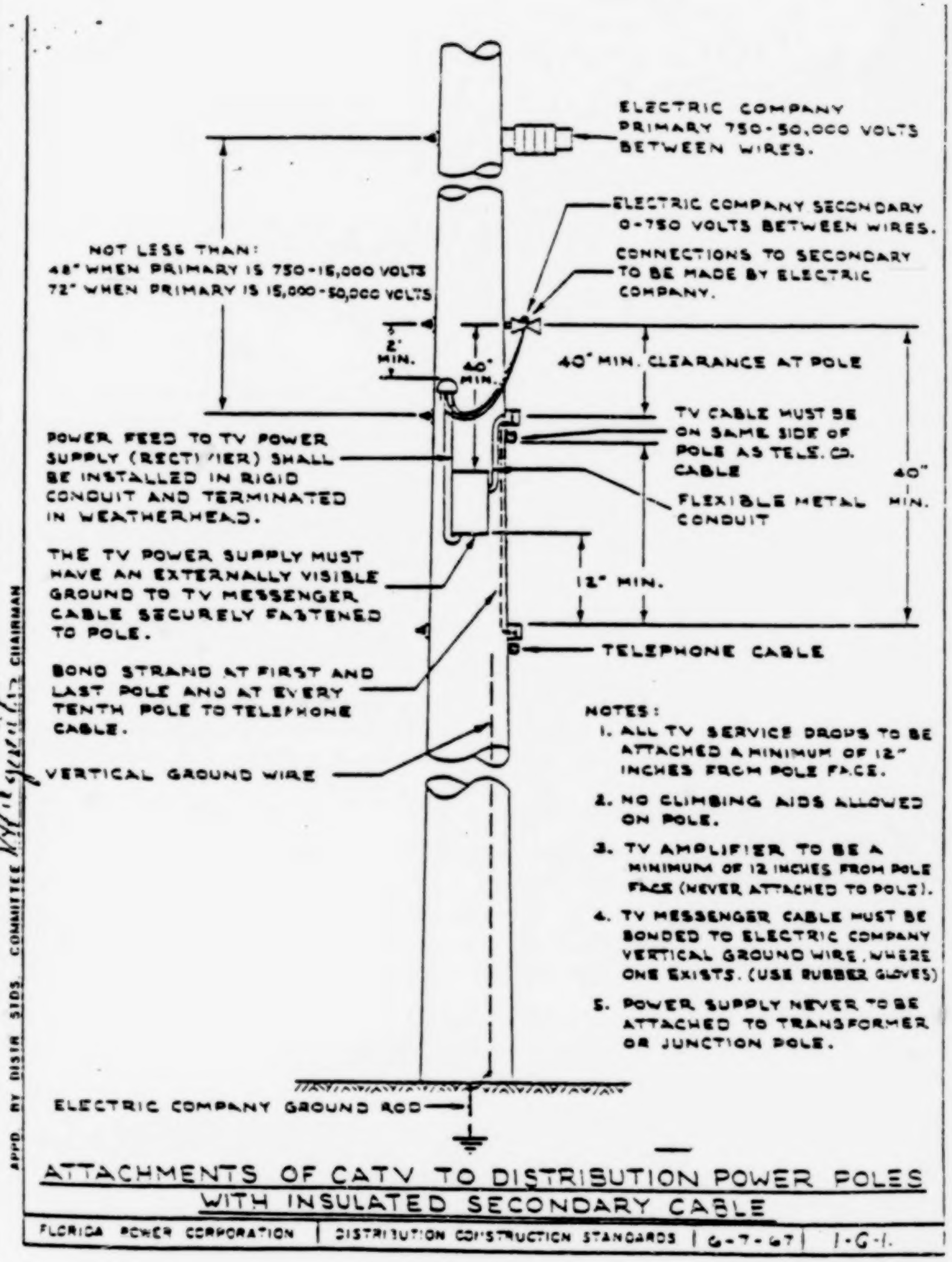
By ____________________

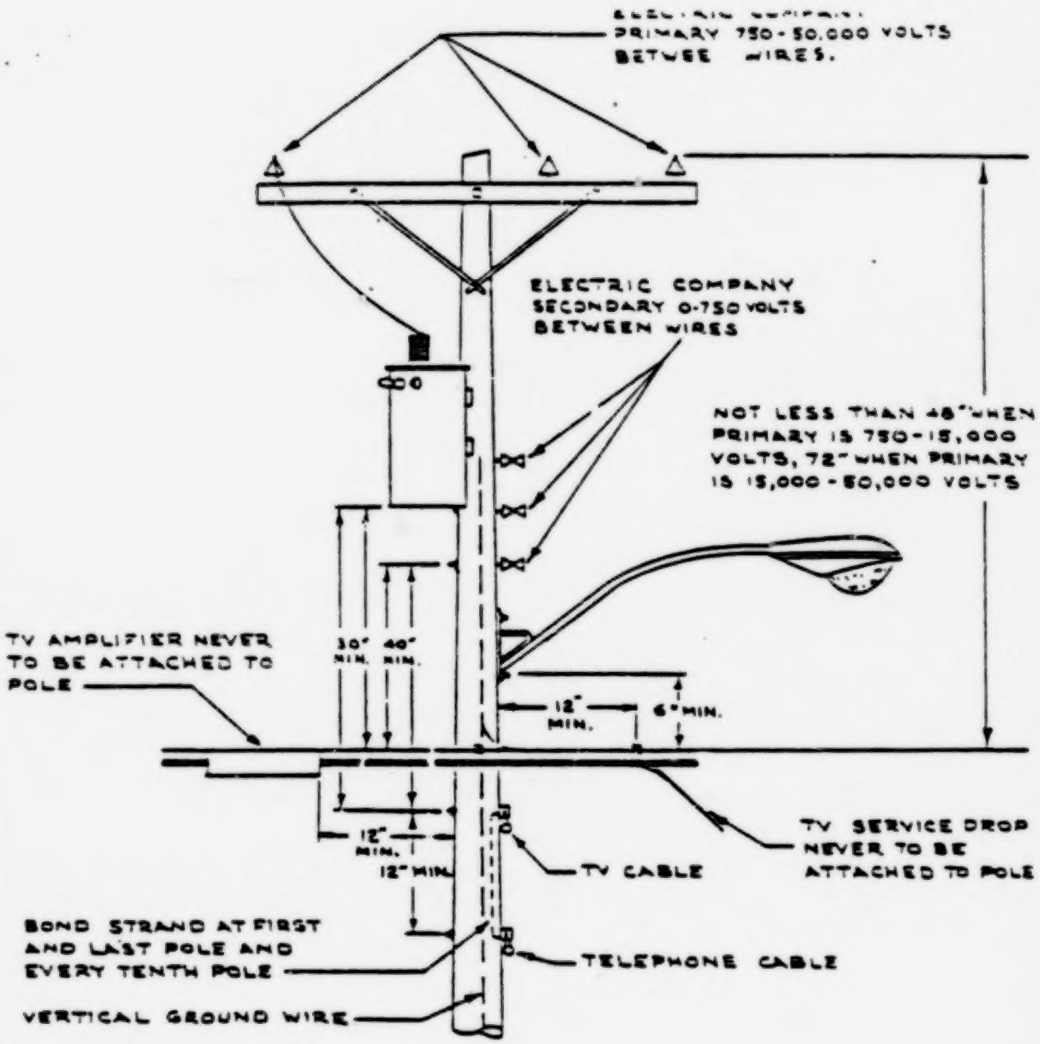
Title ____________________

Notice Acknowledged — By ____________________

__________, 19____ — Title ____________________

Notice No. __________



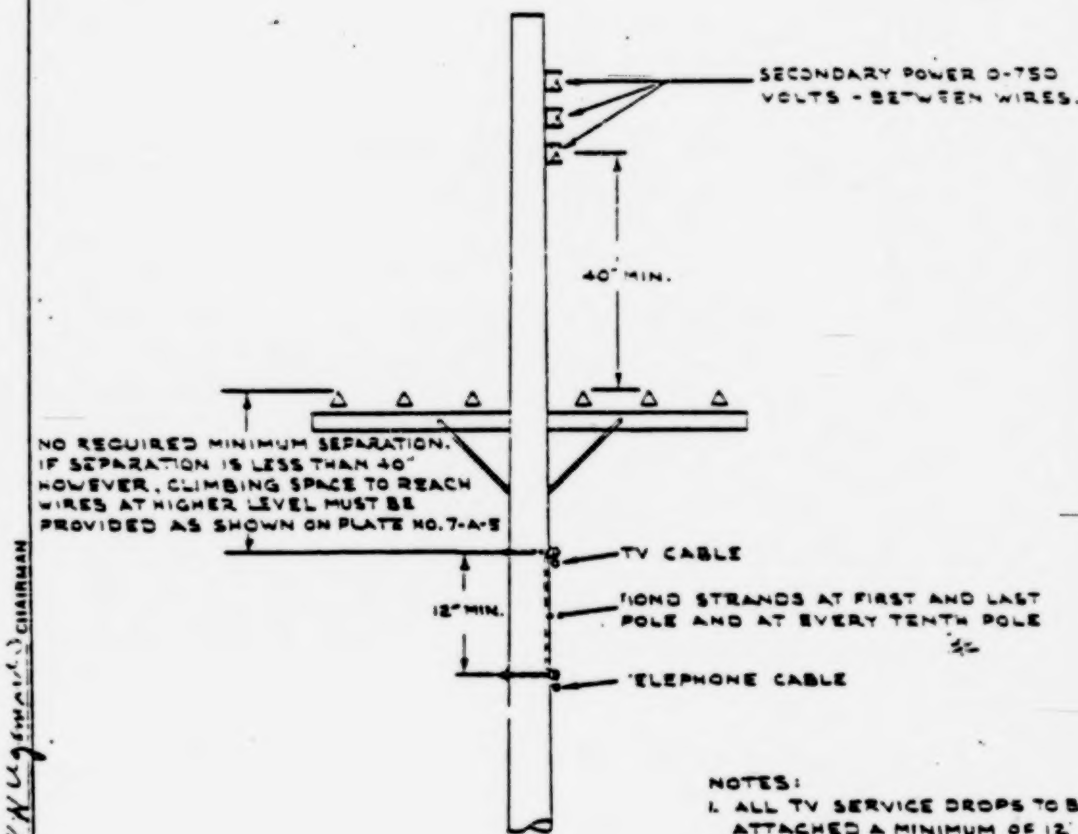


1. TV MESSENGER CABLE MUST BE BONDED TO ELECTRIC COMPANY VERTICAL GROUND WIRE, WHERE ONE EXISTS. (USE RUBBER GLOVES), (DO NOT CUT WOOD MOLDING)
2. NO CLIMBING AIDS ALLOWED ON POLE.
3. POWER SUPPLY NEVER TO BE ATTACHED TO TRANSFORMER OR JUNCTION POLE.

APPD. BY DISTR. STDS. COMMITTEE CHAIRMAN CK. BY

ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES WITH BARE SECONDARY CONDUCTORS

FLORIDA POWER CORPORATION	DISTRIBUTION CONSTRUCTION STANDARDS	5-9-72	J-H



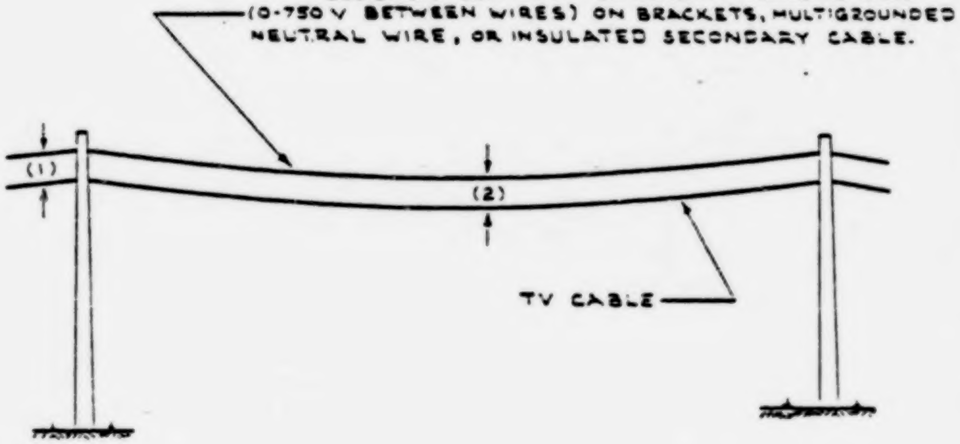
NOTES:

1. ALL TV SERVICE DROPS TO BE ATTACHED A MINIMUM OF 12 INCHES FROM POLE FACE.
2. NO CLIMBING AIDS ALLOWED ON POLES.
3. TV AMPLIFIER TO BE A MINIMUM OF 12 INCHES FROM POLE FACE. (NEVER ATTACHED TO POLE)
4. TV MESSENGER CABLE MUST BE BONDED TO ELECTRIC COMPANY VERTICAL GROUND WIRE, WHERE ONE EXISTS. (USE RUBBER GLOVES)

APPD. BY DISTR. STDS. COMMITTEE CHAIRMAN

ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES WITH TELEPHONE CROSSARM

FLORIDA POWER CORPORATION	DISTRIBUTION CONSTRUCTION STANDARDS	6-7-67	J-H-1



(1) 40 INCH MINIMUM CLEARANCE AT SUPPORT

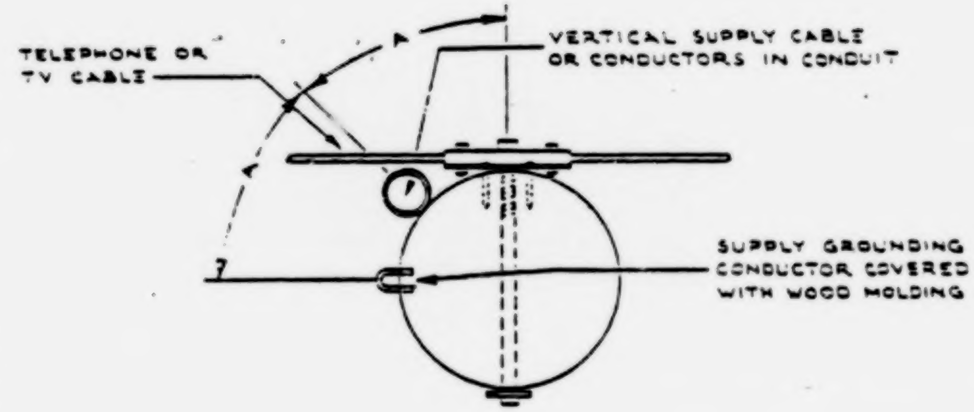
(2) 30 INCH MINIMUM MID-SPAN CLEARANCE

APPD. BY DISTR. STDS. COMMITTEE CHAIRMAN

ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES

CLEARANCE PARALLELING OTHER WIRES

FLORIDA POWER CORPORATION	DISTRIBUTION CONSTRUCTION STANDARDS	6-7-67	1-I



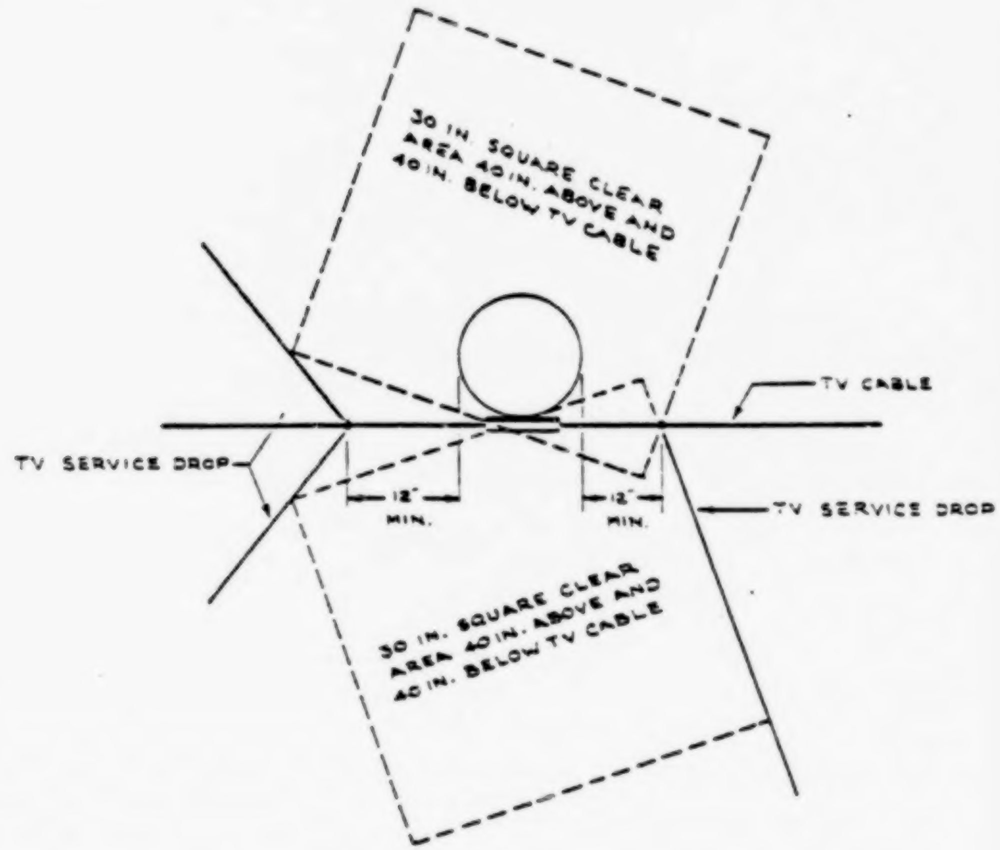
NOTE:
DIMENSION "A" TO BE 45° WHERE PRACTICABLE BUT IN NO CASE SHALL VERTICAL RUNS HAVE A CLEARANCE OF LESS THAN 2 IN. FROM THE NEAREST METAL PART OF THE EQUIPMENT OF ANOTHER USER.

APPD. BY DISTR. STDS. COMMITTEE CHAIRMAN

ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES

LOCATION OF VERTICAL RUNS

FLORIDA POWER CORPORATION	DISTRIBUTION CONSTRUCTION STANDARDS	6-7-67	7-I-1



APPD BY DISTR STDS COMMITTEE ... CHAIRM.

ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES

CLIMBING SPACE ON JOINTLY USED POLES

ATTACHMENT AGREEMENT BETWEEN FLORIDA POWER CORPORATION AND ACTON CATV, INC. d/b/a PASCO ASSOCIATES VENTURE

SECTION 0.1 THIS AGREEMENT, made and entered into this 16th day of June, 1980, by and between FLORIDA POWER CORPORATION, a corporation organized and existing under the laws of the State of Florida, herein referred to as the "Electric Company", and Acton CATV, Inc. d/b/a Pasco Associates Venture, organized and existing under the laws of the State of Massachusetts, herein referred to as the "Television Company".

WITNESSETH:

SECTION 0.2 WHEREAS, the Television Company proposes to furnish cable television distribution service in Sections 9, 10, 14, 15, 16, 21, 23, 27, 28, 29, 31, 33, and 34, Township 25 South, Range 16 East, and Sections 3, 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 28, 29, 30, 31, 32 and 33, Township 26 South, Range 16 East, Pasco County, Florida; and will need to erect and maintain aerial cables, wires and associated appliances throughout the area to be served and desires to attach such cables, wires and appliances to poles of the Electric Company; and

SECTION 0.3 WHEREAS, the Electric Company is willing to permit, to the extent it may lawfully do so, the attachment of said cables, wires and appliances to its existing poles where, in its judgment, such use will not interfere with its own service requirements, including consideration of economy and safety.

SECTION 0.4 NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein con-

EXHIBIT B

tained, the parties hereto mutually covenant and agree as follows:

ARTICLE I

SCOPE OF AGREEMENT

SECTION 1.1 This agreement shall be in effect in the portions of counties described in Section 0.2 above in which the Electric Company provides electric distribution service.

SECTION 1.2 The Electric Company reserves the right to deny the attachment of cables, wires and appliances to its poles by the Television Company which have been installed for purposes other than or in addition to normal distribution of electric service, including, but not limited to, poles which in the judgment of the Electric Company (i) are required for the sole use of the Electric Company, (ii) would not readily lend themselves to attachments by the Television Company because of interference, hazards, or similar impediments, present or future, or (iii) have been installed primarily for the use of a third party.

SECTION 1.3 Pursuant to the rights provided for in the foregoing section, the Electric Company hereby excludes its poles used to support its transmission line (lines with voltage in excess of 50 KV between conductors) and concrete poles without special written permission from the Electric Company.

ARTICLE II

PLACING, TRANSFERRING OR REARRANGING ATTACHMENTS

SECTION 2.1 Before making attachment to any pole or poles of the Electric Company, the Television Company shall make application and receive a permit therefore in the form of Exhibit A, attached hereto and made a part

hereof. Unless waived in writing by the Electric Company, the Television Company shall commence and complete all attachment work within the time limits set forth in said Exhibit A.

SECTION 2.2 The Television Company shall, at its own expense, make and maintain said attachments in safe condition and in thorough repair, and in a manner suitable to the Electric Company and so as will not conflict with the use of said poles by the Electric Company, or by other utility companies using said poles, or interfere with the working use of facilities thereon or which may from time to time be placed thereon. The Television Company shall forthwith, at its own expense, upon notice from the Electric Company, remove, relocate, replace or renew its facilities placed on any pole or pole line, or transfer them to substituted poles, or perform any other work in connection with said facilities that may be required by the Electric Company; provided, however, that in cases of an emergency, the Electric Company may arrange to relocate, replace or renew the facilities placed on said poles by the Television Company, transfer them to substituted poles, or perform any other work in connection with said facilities that may be required in the maintenance, replacement, removal or relocation of said poles, the cilities thereon or which may be placed thereon, or for the service needs of the Electric Company, and the Television Company shall, on demand, reimburse the Electric Company for the nonbetterment expense thereby incurred. Nothing in this Section shall be construed to relieve the Television Company of maintaining adequate work forces readily at hand to promptly repair, service and maintain the Television Company's facilities where such condition is hindering the Electric Company's operations.

SECTION 2.3 The Television Company's cables, wires and appliances, in each and every location, shall be erected and maintained in accordance with the requirements and specifications of the Electric Company and of the National

Electrical Safety Code, or any amendments or revisions of said specifications or code. Drawings marked 1-G-1, 1-H, 1-H-1, 1-I, 1-I-1, 1-J, attached hereto and by this reference thereto incorporated herein, when not otherwise specified by the Electric Company, are descriptive of minimum required construction under some typical conditions, and will be amended as related Electric Company specifications are changed.

SECTION 2.4 In the event that any pole or poles of the Electric Company to which the Television Company desires to make attachments are inadequate to support the additional facilities in accordance with the aforesaid specifications, the Electric Company will indicate on said Exhibit A the changes necessary to provide adequate poles and the estimated cost thereof to the Television Company and return it to the Television Company; and if the Television Company still desires to make the attachments and returns the Exhibit marked to so indicate, together with an advance payment to reimburse the Electric Company for the entire estimated non-betterment portion of the cost and expense thereof, including the increased cost of larger poles, sacrificed life value of poles removed, cost of removal less any salvage recovery and the expense of transferring the Electric Company's facilities from the old to the new poles, the Electric Company will replace such inadequate poles with suitable poles. Where the Television Company's desired attachments can be accommodated on present poles of the Electric Company by rearranging the Electric Company's facilities thereon, the Television Company will compensate the Electric Company in advance for the full estimated expense incurred in completing such rearrangements. The Television Company will also in advance reimburse the Owner or Owners of other facilities attached to said poles for any expense incurred by it or them in transferring or rearranging said facilities. Any strengthening of poles (guying) required to accommodate the attachments

of the Television Company shall be provided by and at the expense of the Television Company and to the satisfaction of the Electric Company. The Television Company shall not set intermediate poles under or in close proximity to the Electric Company's facilities. The Television Company may, however, request the Electric Company to set such intermediate poles as the Television Company may desire, and the Electric Company shall have the option to accept or reject such request. If such request is granted, the Television Company shall reimburse the Electric Company for the full cost of setting such pole or poles.

SECTION 2.5 The Electric Company reserves to itself, its successors and assigns, the right to maintain its poles and to operate its facilities thereon in such manner as will best enable it to fulfill its own service requirements, and in accordance with the National Electrical Safety Code or any amendments or revisions of said Code and such specifications particularly applying to the Electric Company hereinbefore referred to. The Electric Company shall not be liable to the Television Company for any interruption to service of the Television Company or for interference with the operation of the cables, wires and appliances of the Television Company arising in any manner out of the use of the Electric Company's poles hereunder.

SECTION 2.6 The Television Company shall exercise special precautions to avoid damage to facilities of the Electric Company and of others supported on said poles, and hereby assumes all responsibility for any and all loss for such damage caused by the Television Company. The Television Company shall make an immediate report to the Electric Company of the occurrence of any damage and hereby agrees to reimburse the Electric Company for the expense incurred in making repairs. Damage to plant or facilities of the Television Company or damage to any appliance or equipment of a subscriber to the Television Company's service, arising from accidental contact with the Electric

Company's energized conductors, shall be assumed by the Television Company.

ARTICLE III

EVIDENCE TO OPERATE FROM GOVERNMENT AND MUNICIPAL AUTHORITIES

SECTION 3.1 Notwithstanding the provisions of Section 12.1, the Television Company shall, as conditions precedent to the exercise of any rights granted by this Agreement, submit to the Electric Company: (1) certified copies of all franchises, permits, licenses or certificates of convenience and necessity granted by state and local governmental bodies authorizing the Television Company to erect and maintain its facilities within public streets, highways, and other thoroughfares located within the geographical area described in Section 0.2, and (2) a certified copy of its certificate from the Federal Communication Commission authorizing it to own and operate a cable television system in the geographical area described in Section 0.2.

ARTICLE IV

RIGHT-OF-WAY FOR TELEVISION COMPANY'S ATTACHMENTS

SECTION 4.1 It shall be the sole responsibility of the Television Company to obtain for itself such rights-of-way or easements as may be appropriate for the placement and maintenance of its attachments to the Electric Company's poles located on private property. While the Electric Company and the Television Company will cooperate as far as may be practicable in obtaining rights-of-way for both parties on the Electric Company's poles, no guarantee is given by the Electric Company of permission from property owners, municipalities or others for use of poles and right-of-way easement by the Television Company; and if objection

is made thereto and the Television Company is unable to satisfactorily adjust the matter within a reasonable time, the Electric Company may at any time, upon thirty (30) days' notice in writing to the Television Company, require the Television Company to remove its attachments from the poles involved and the Television Company shall, within thirty (30) days after receipt of said notice, remove its attachments from said poles and its appliances from said right-of-way easement at its sole expense. Should the Television Company fail to remove its attachments and appliances, as herein provided, the Electric Company may remove them without any liability for loss or damage, and the Television Company shall reimburse the Electric Company for the expense incurred.

ARTICLE V

INSPECTION

SECTION 5.1 The Electric Company, because of the importance of its service, reserves the right to inspect each new installation of the Television Company on its poles and in the vicinity of its lines or appliances and to make periodic inspections, semi-annually or oftener [*sic*] as plant conditions may warrant, of the entire plant of the Television Company; and the Television Company shall, on demand, reimburse the Electric Company for the expense of such inspections. Such inspections, made or not, shall not operate to relieve the Television Company of any responsibility, obligation or liability assumed under this agreement; provided, however, that such inspections, as to payment by the Television Company to the Electric Company, shall be limited to not more than one inspection each calendar year during the period covered by the agreement.

SECTION 5.2 Bills for inspections, expenses and other charges under this agreement, except those advance payments specifically covered herein, shall be payable within

thirty (30) days after presentation. Non-payment of bills shall constitute a default of this agreement.

SECTION 5.3 The Television Company shall furnish bond issued by a corporate surety acceptable to the Electric Company to guarantee the payment of any sums which may become due to the Electric Company for rentals, inspections, or for work performed for the benefit of the Television Company under this agreement including the removal of attachments upon termination of this agreement by any of its provisions, as provided on the attachment Schedule of Required Bond Coverage. The Schedule of Required Bond coverage may be subject to revision by the Electric Company from time to time to be consistent with any increases in construction costs or rental attachment rates. The Electric Company will give the Television Company ninety (90) days notification prior to the effective date of any such Schedule revision.

ARTICLE VI

ABANDONMENT AND REMOVAL OF ATTACHMENTS

SECTION 6.1 The Television Company may at any time remove its attachments from any pole or poles of the Electric Company, but shall immediately give the Electric Company written notice of such removal in the form of Exhibit B, attached hereto and made a part hereof. No refund of any rental will be due on account of such removal, nor proration made for less than one-half year.

SECTION 6.2 Upon notice from the Electric Company to the Television Company that the use of any pole or poles is forbidden by governmental authorities or property owners, the permit covering the use of such pole or poles shall immediately terminate and the cables, wires and appliances of the Television Company shall be removed at once from the affected pole or poles.

ARTICLE VII

RENTAL AND PROCEDURE FOR PAYMENTS

SECTION 7.1 Television Company shall pay to the Electric Company, for attachments made to poles under this agreement, a rental at the rate of ($7.15) Seven Dollars and 15/100 per pole per year. Said rental shall be payable semi-annually in advance on the first day of January and the first day of July of each year during which this agreement remains in effect. Semi-annual rental payments shall be based upon the number of poles on which attachments are being maintained on the first day of June and the first day of December immediately preceding the respective due dates for semi-annual payments. The first payment of rental hereunder shall include such prorated amount as may be due for use of poles for the period of time from the effective date hereof until the end of the calendar year in which the agreement becomes effective.

SECTION 7.2 If the Electric Company decides to make a field inspection of the entire plant of the Television Company in accordance with Section 5.1 of this Agreement and, further, if the Electric Company finds that the attachment inventory records are in error, then upon completion of such inventory, the office records will be adjusted accordingly and subsequent billing will be based on the adjusted number of attachments. The corrections to the estimations made over the years elapsed since the preceding inventory shall be prorated equally (i.e., if the latest joint field check shows 100 more CATV attachments than office records indicate and if the interval since the last joint field check is 5 years, then each of the intervening annual pole inventory amounts would be adjusted upward by 20 poles). In calculating retroactive billing for the years elapsed since a preceding inventory, full consideration will be given for the cost of money, as experienced by the Electric Company, over that period of time. The prime annual interest rate used in calculating the annual cost of

money will be determined by using average annual interest rate, + 2%, for the 7 Southeast centers, Bank rates on short-term business loans, money and interest rates, *Survey of Current Business*, as published by the United States Department of Commerce/Social and Economic Statistics Administration/Bureau of Economic Analysis.

SECTION 7.3 If for any reason the Television Company is delinquent in the payment of any bills as herein provided by this contract and upon 30 days after receipt of an invoice from the Electric Company, the Electric Company can, at its option, charge the Television Company prime annual interest as defined in the aforementioned Section 7.2.

ARTICLE VIII

PERIODICAL REVISION OF ATTACHMENT PAYMENT RATE

SECTION 8.1 The attachment rate set forth in Section 7.1 shall be subject to annual revision at the request of either party made in writing to the other not later than sixty (60) days before the anniversary date of this agreement. If the parties hereto fail to agree upon a revision of such rate prior to said anniversary date, the then attachment rate for each subsequent annual period until further revised, shall be an amount equal to one-half of the current annual cost of installing and maintaining an average attachment pole.

SECTION 8.2 Current annual cost as referred to in Section 8.1 refers to the current carrying charges which would be experienced by the Electric Company by owning, installing and maintaining an average attachment pole and is arrived at by using current costs to install an average attachment pole and then applying a percentage (a fixed charge rate which includes all related costs associated with ownership thereto covering current fixed charges).

SECTION 8.3 An average attachment pole, as referred to in Sections 8.1 and 8.2, is defined to mean the average of a 35-foot and 40-foot pole.

ARTICLE IX

DEFAULTS

SECTION 9.1 If the Television Company shall fail to comply with the provisions of this agreement, including the specifications hereinbefore referred to, or default in any of its obligations under this agreement and such default or non-compliance shall continue for thirty (30) days after notice thereof in writing from the Electric Company to correct such default or non-compliance, all rights of the Television Company hereunder shall be suspended, including its right to occupy the Electric Company's poles and, if such default shall continue for a period of thirty (30) days after such suspension, the Electric Company may, at its option, forthwith terminate this agreement or the permit covering the poles to which such default or non-compliance shall have occurred. In case of such termination, no refund or prepaid rentals shall be made.

ARTICLE X

LIABILITY AND INSURANCE

SECTION 10.1 The Television Company shall assume full responsibility for the attachment of its facilities pursuant to this agreement and will defend and hold the Electric Company harmless against and indemnify it for any and all accidents or damages or claims or costs whatsoever arising within the scope thereof or in carrying out this agreement, irrespective of negligence actual or claimed on the part of the Electric Company. If any member of the public, or any employee or agent of the Television Company, or any employee or agent of a contractor is injured

or killed, or if any property including the Electric Company's or the public's is damaged in the course of work being performed under the provisions of this agreement, the Television Company will notify the Electric Company personnel who is inspecting the work, or in his absence, the Electric Company's supervisor who originated the contract with the Television Company. Such notification will be made immediately in person and or by telephone and promptly confirmed in writing, and will include all pertinent data such as name of injured party, location of accident, description of accident, nature of injuries, names of witnesses, disposition of injured or deceased person.

SECTION 10.2 As a safeguard in respect to Section 10.1 above, the Television Company will carry Workmen's Compensation Insurance in the maximum amounts required by statute and will also carry policies of insurance acceptable to the Electric Company with respect to (a) General Liability with Bodily Injury limits not less than $500,000 each person and $1,000,000 each occurrence and with Property Damage limits not less than $100,000 each occurrence and $200,000 aggregate, and (b) Automobile Liability with Bodily Injury limits not less than $500,000 each person and $1,000,000 each occurrence and with Property Damage limits not less than $100,000 each occurrence. The Television Company will have the insurance policies mentioned in (a) and (b) above, respectively, endorsed by its insurance carrier to provide blanket contractual coverage, expressly with respect to Section 10.1 above, to the full limits of and for the liabilities insured under said policies; and prior to the commencement of any work hereunder, the Television Company will furnish the Electric Company with a certificate, in duplicate, on the Electric Company's Form 908-404(S) completed by the Television Company's insurance carrier showing it carries the requisite insurance and that the specified policies insure the liability assumed by the Television Company under Section 10.1 above.

SECTION 10.3 The Television Company is hereby advised that the generation, transmission and/or distribution of electrical energy involves the handling of a natural force which, when uncontrolled, is inherently hazardous to life and property. The Television Company is further hereby advised that, due to the nature of the work to be performed hereunder, other hazardous or dangerous conditions (not necessarily related to the inherent danger of electricity) may also be involved in the work. Accordingly, prior to the commencement of the attachment of any cable television facilities to the poles of the Electric Company, the Television Company shall inspect the job site specifically to ascertain the actual and potential existence and extent of any hazardous or dangerous conditions, and instruct its employees with respect to said conditions and the safety measures to be taken in connection therewith; and during the course of the work, the Television Company shall take all such measures as may be deemed necessary or advisable to protect and safeguard the person and property of its employees and of the general public against all hazardous or dangerous conditions as the same arise.

SECTION 10.4 The Television Company and its duly authorized agents and employees shall, before climbing poles or structures, make certain that they are strong enough to safely sustain workmen's weight in the performance of the required work on the poles or structures. All work designated in any Application and Permit under this agreement to be performed near energized electrical conductors shall be performed under the conditions and at the place as stated, but only with the specific understanding that if the Television Company in its sole discretion regards the place where such work is to be performed, or where such work is being performed, as an unsafe place to work, either because the said conductors or other equipment are so energized, or because it is deemed unsafe for any other reason or condition or conditions then and there existing, it shall request the Electric Company for a clearance to

de-energize the said conductors or other equipment, or to make such other change or changes as may be necessary or desirable in the Television Company's sole discretion, to render the place of performance at the job site a safe place to work for the Television Company's employees. In the absence of any request by the Television Company to the Electric Company it shall be conclusively presumed that the place where the work is to be performed is a safe place to work without the de-enerization [*sic*] o. such conductors or other equipment, and without making any changes whatsoever at the job site.

ARTICLE XI

EXISTING RIGHTS OF OTHER PARTIES

SECTION 11.1 Nothing herein contained shall be construed to confer on the Television Company an exclusive right to make attachments to the Electric Company's poles in the area covered by this agreement and any supplement thereto, and it is expressly understood that the Electric Company has the unconditional right to permit any other person, firm or corporation to make attachments to the same poles in that area covered in this agreement and supplements thereto. However, under no circumstances will the Electric Company grant permits permitting more than one attachment for cable television distribution service to any pole or pole line.

ARTICLE XII

TERM OF AGREEMENT

SECTION 12.1 This agreement shall become effective upon its execution and if not terminated in accordance with the provisions of Section 9.1 shall continue in effect for a term of not less than one (1) year. Either party may terminate the agreement at the end of said year or at any time

thereafter by giving the other party at least a six (6) months' written notice. Upon termination of the agreement in accordance with any of its terms, the Television Company shall immediately remove its cables, wires and appliances from all poles of the Electric Company. If not so removed, the Electric Company shall have the right to remove them at the cost and expense of the Television Company and without any liability therefor. The Electric Company shall deliver to the Television Company, or the bonding company, any equipment so removed upon termination of this agreement, upon payment of the cost of removal, cost of storage and delivery, and all other amounts then due the Electric Company.

ARTICLE XIII

ASSIGNMENT OF RIGHTS

SECTION 13.1 The Television Company shall not assign, transfer or sublet the privileges hereby granted without the prior consent in writing of the Electric Company.

SECTION 13.2 No use, however extended, of the Electric Company's poles, under this agreement, shall create or vest in the Television Company any ownership or property rights in said poles, but the Television Company's rights therein shall be and remain a mere revocable license. Nothing herein contained shall be construed to compel the Electric Company to maintain any of said poles for a period longer than demanded by its own service requirements. The Electric Company reserves the right to deny licensing of any poles to the Television Company for any reason whatsoever (within the sole discretion of the Electric Company).

ARTICLE XIV

WAIVER OF TERMS OR CONDITIONS

SECTION 14.1 Failure to enforce or insist upon compliance with any of the terms or conditions of this agreement shall

not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

ARTICLE XV

BONDING TO ELECTRIC COMPANY GROUND

SECTION 15.1 For the purpose of this article, the following terms when used herein shall have the following meaning, to wit:

15.1.1 "Vertical ground wire" shall mean a wire conductor of the Electric Company attached vertically to the pole and extended from the Electric Company's multi-grounded neutral (defined below) through the Television Company's space to the base of the pole where it may be either butt wrapped on the pole or attached to a grounded electrode.

15.1.2 "Multi-grounded neutral" shall mean an Electric Company conductor located in the Electric Company's space which is bonded to all Electric Company vertical ground wires.

15.1.3 "Bonding Wire" shall mean a number 6 AWG copper wire conductor connecting equipment of the Television Company and the Electric Company to the vertical ground wire.

SECTION 15.2 At the time the Television Company cable is installed, the Television Company shall install a "bonding wire" on every pole where a "vertical ground wire" exists. Any piece of television equipment attached to an Electric Company pole which does not have a "vertical ground wire" shall be bonded to the television cable messenger.

SECTION 15.3 Under no condition will the Electric Company's vertical ground wire be broken, cut, severed, or otherwise damaged by the Television Company.

SECTION 15.4 The Electric Company reserves the right to install a "bonding wire" to any piece of television equipment where, in the opinion of the Electric Company, a safety hazard exists or may exist in the future.

SECTION 15.5 It shall be the responsibility of the Television Company to instruct its personnel working on the Electric Company's poles of the dangers involved in bonding its wires to the Electric Company's "vertical ground wire" and associated dangers thereof, and to furnish adequate protective equipment so as to save its personnel from bodily harm. As stated in Article X above, the Electric Company assumes no responsibility either for instructing, for furnishing equipment to, or for the liability involved in the Television Company's personnel working on the Electric Company's poles.

ARTICLE XVI

AUTOMATIC TERMINATION

SECTION 16.1 Notwithstanding the provisions of Section 12.1 of this agreement, it shall be automatically terminated on x x x x x x x x x, 19xx, in the event that the Television Company shall fail to commence making cable attachments on or before that date; it shall be automatically terminated on x x x x x x x x x, 19xx, in the event that the Television Company shall fail to provide television distribution service throughout the area described in Section 0.2 of this agreement on or before that date; it shall be automatically terminated upon expiration, suspension, cancellation or termination of any franchise, license, permit or certificate of convenience and necessity that the Television Company is required by law to obtain and maintain in full force and effect.

Subject to the provisions of Section 13.1 hereof, this agreement shall extend to and bind the successors and assigns of the parties hereto.

ARTICLE XVII

MISCELLANEOUS PROVISIONS

SECTION 17.1 Attorney's Fees. In the event of any litigation between the parties hereto brought to enforce rights granted by this agreement, the prevailing party therein shall be allowed all reasonable attorney's fees expended or incurred in such litigation, in trial and appellate courts, to be recovered as a part of the costs therein.

SECTION 17.2 Venue of Actions. Any and all litigation between the parties hereto arising out of this agreement shall be instituted and maintained in the Circuit Courts for Pinellas County, Florida, with the exception of any cause of action arising by virtue of the laws of the United States, which litigation shall be instituted in the United States District Court, Middle District, Tampa Division.

SECTION 17.3 Controlling Law. This agreement shall be construed and enforced in accordance with the laws of the State of Florida.

ARTICLE XVIII

EXISTING CONTRACTS

SECTION 18.1 This agreement supersedes the existing agreement entered into between the two parties on the x x x x day of x x x x x x x, 19xx.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate, and their corporate seals to be affixed thereto, by their respective officers thereunto duly authorized, on the day, month and year first above written.

Attest:	FLORIDA POWER CORPORATION
/s/ Betty M. Clayton Asst. Secretary	By /s/ Ned B. Sparke Vice President
	ACTON CATV, INC. d/b/a BROOKSVILLE PROPERTIES VENTURE
Attest:	
/s/ Illegible Asst. Secretary	By /s/ Illegible Vice President

SCHEDULE OF REQUIRED BOND COVERAGE

NUMBER OF ATTACHMENTS	AMOUNT OF COVERAGE
0 - 500	$ 5,000
501 - 1,000	10,000
1,001 - 2,000	20,000
2,001 - 3,000	30,000
3,001 - 4,000	40,000
4,001 - 5,000	50,000
5,001 - 6,000	60,000
6,001 - 7,000	70,000
7,001 - 8,000	80,000
8,001 - 9,000	90,000
Over 9,000	100,000

EXHIBIT A

ATTACHMENT RENTAL CONTRACT

AND
FLORIDA POWER CORPORATION
Application and Permit

__________, 19____

____

In accordance with the terms of agreement dated ____, 19____, application is hereby made for permit to make attachments to Florida Power Corporation poles for installation of cable television facilities as indicated on the attached construction detail drawing/s number/s ______________ .

Certified copies of approved construction permits, as may be required by local governmental authority for the facilities indicated on the drawing/s, are attached also. Construction work, as provided for under this "Application and Permit," shall commence within thirty (30) days and be completed within one hundred twenty (120) days of the approval date of this application and permit as set forth below, otherwise this application and permit shall become null and void.

By ______________________

Title ____________________

Permit will be granted, subject to your approval of the following changes and rearrangements at an estimated cost to you of $__________, payable in advance.

Permit denied under Section 13.2, __________, 19____.

The above changes and rearrangements approved ____, 19____, and advance payment therefor enclosed.

By ____________________

Title ____________________

Permit Approved ________, 19____ By ____________________

Permit No. ____________

Total Previous Attachments

Attachments This Permit ___ Title ____________________

New Total ____________

EXHIBIT B

ATTACHMENT RENTAL CONTRACT

AND

FLORIDA POWER CORPORATION

Notification of Removal by Television Company

__________, 19____

____

In accordance with the terms of the agreement dated ____, 19____, kindly cancel from your records the following poles covered by Permit No. ___________, from which attachments were removed on ________, 19___.

Location: City __________ County __________, Florida.

Pole Number   Permit No.   Pole Location

By ____________________

Title ____________________

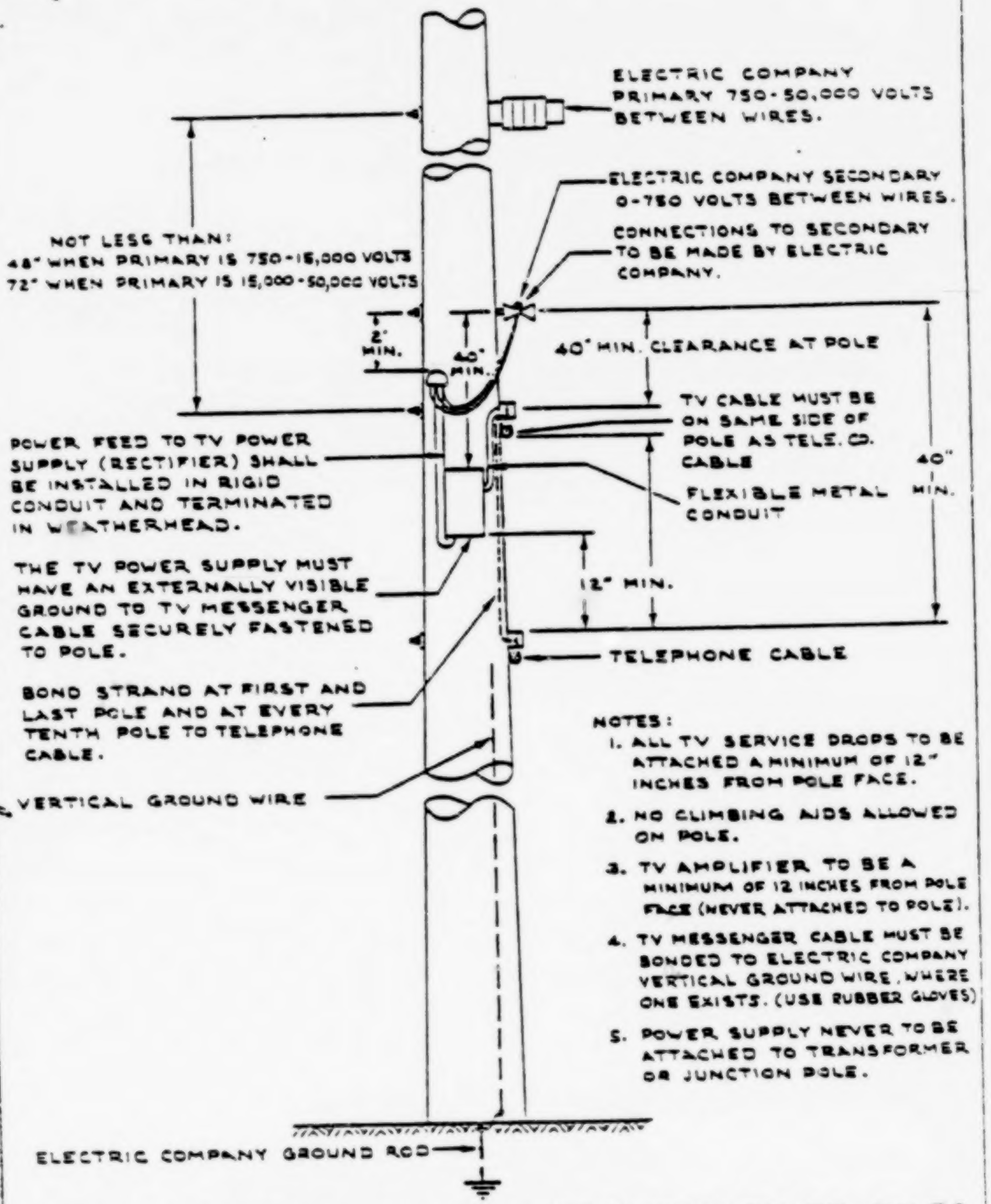
Notice Acknowledged __________, 19____ By ____________________ Title ____________________

Notice No. ____________

Total Poles Discontinued This Notice ________

Pole Previously Vacated ____________

Total Poles Vacated To Date ____________



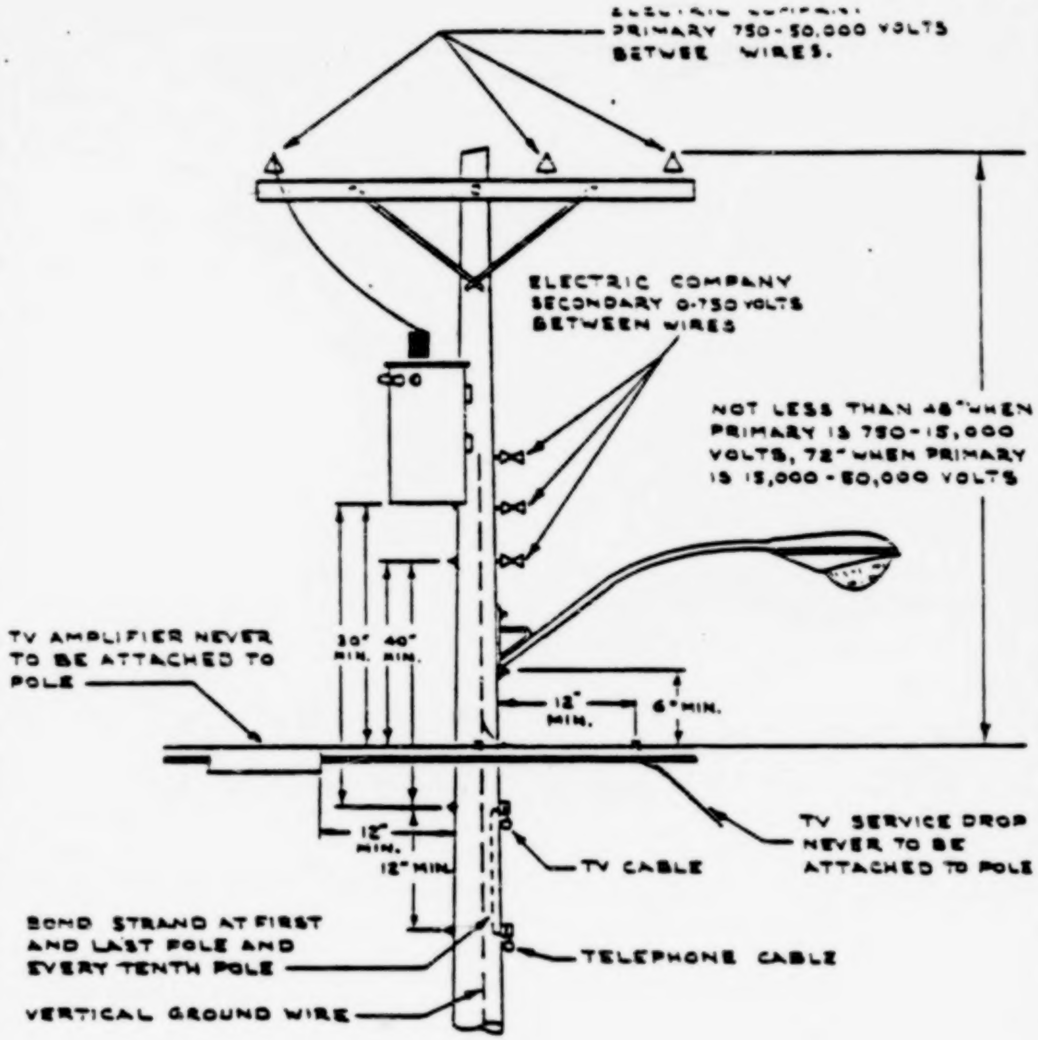
NOTES:

1. ALL TV SERVICE DROPS TO BE ATTACHED A MINIMUM OF 12" INCHES FROM POLE FACE.
2. NO CLIMBING AIDS ALLOWED ON POLE.
3. TV AMPLIFIER TO BE A MINIMUM OF 12 INCHES FROM POLE FACE (NEVER ATTACHED TO POLE).
4. TV MESSENGER CABLE MUST BE BONDED TO ELECTRIC COMPANY VERTICAL GROUND WIRE, WHERE ONE EXISTS. (USE RUBBER GLOVES)
5. POWER SUPPLY NEVER TO BE ATTACHED TO TRANSFORMER OR JUNCTION POLE.

APPD. BY DISTR. STDS. COMMITTEE [signature] CHAIRMAN

ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES WITH INSULATED SECONDARY CABLE

FLORIDA POWER CORPORATION	DISTRIBUTION CONSTRUCTION STANDARDS	6-7-67	1-G-1

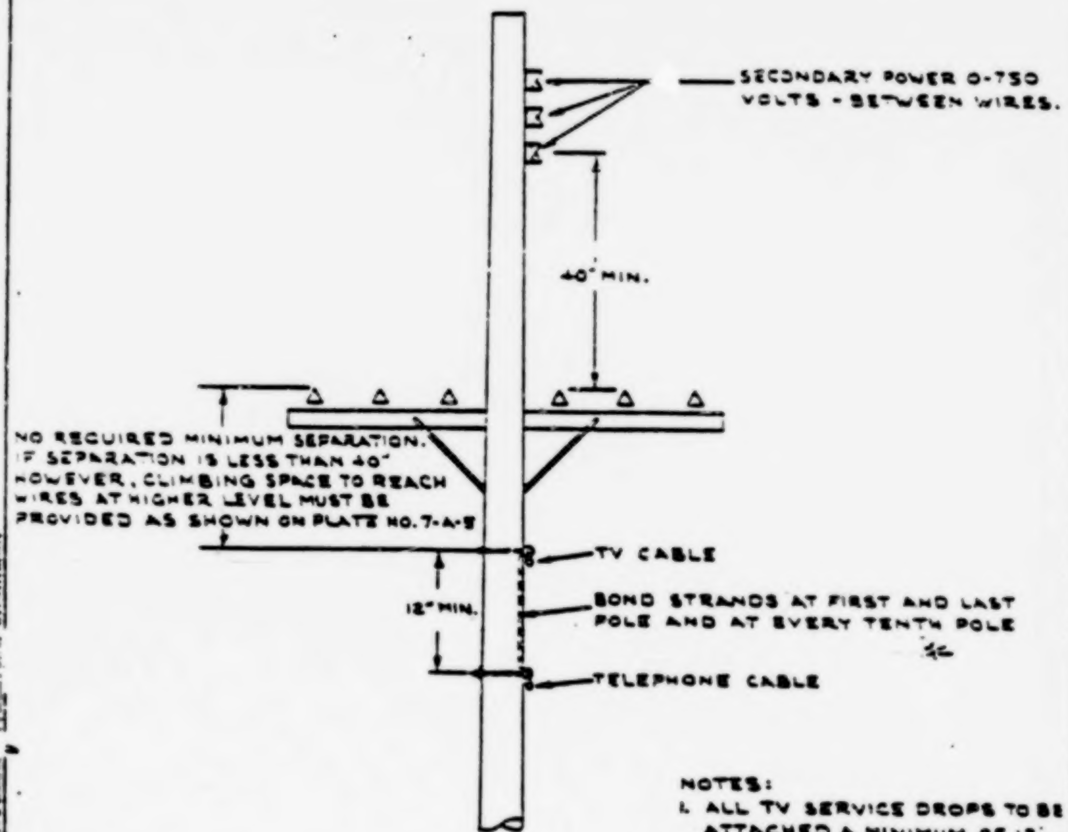


1. TV MESSENGER CABLE MUST BE BONDED TO ELECTRIC COMPANY VERTICAL GROUND WIRE, WHERE ONE EXISTS. (USE RUBBER GLOVES), (DO NOT CUT WOOD MOLDING)
2. NO CLIMBING AIDS ALLOWED ON POLE.
3. POWER SUPPLY NEVER TO BE ATTACHED TO TRANSFORMER OR JUNCTION POLE.

APPD. BY DISTR. STDS. COMMITTEE [signature] CHAIRMAN

ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES WITH BARE SECONDARY CONDUCTORS

FLORIDA POWER CORPORATION	DISTRIBUTION CONSTRUCTION STANDARDS	5-9-72	1-H



NOTES:

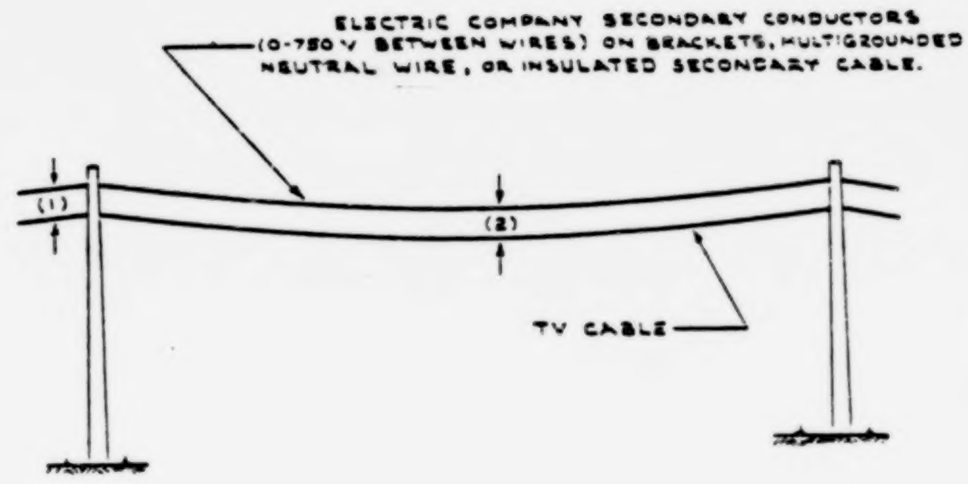
1. ALL TV SERVICE DROPS TO BE ATTACHED A MINIMUM OF 12" INCHES FROM POLE FACE.
2. NO CLIMBING AIDS ALLOWED ON POLES.
3. TV AMPLIFIER TO BE A MINIMUM OF 12 INCHES FROM POLE FACE. (NEVER ATTACHED TO POLE)
4. TV MESSENGER CABLE MUST BE BONDED TO ELECTRIC COMPANY VERTICAL GROUND WIRE, WHERE ONE EXISTS. (USE RUBBER GLOVES)

APPD BY DISTR STDS COMMITTEE R.H. Ugma... CHAIRMAN

ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES

WITH TELEPHONE CROSSARM

FLORIDA POWER CORPORATION	DISTRIBUTION CONSTRUCTION STANDARDS	6-7-67	J-H-1



(1) 40 INCH MINIMUM CLEARANCE AT SUPPORT

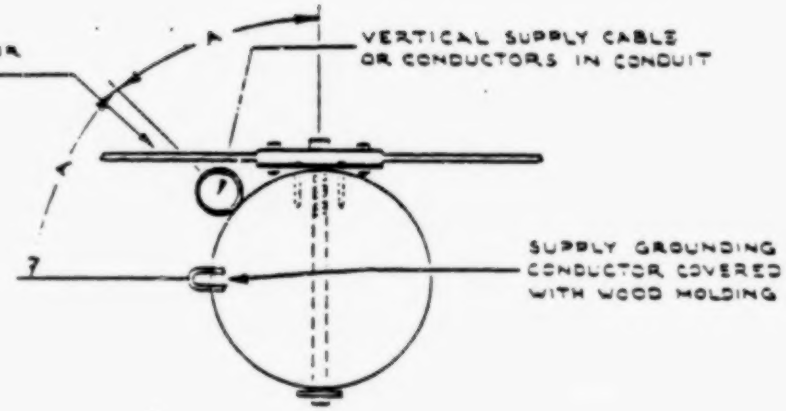
(2) 30 INCH MINIMUM MID-SPAN CLEARANCE

APPD BY DISTR STDS COMMITTEE R.H. Ugma... CHAIRMAN

ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES

CLEARANCE PARALLELING OTHER WIRES

FLORIDA POWER CORPORATION	DISTRIBUTION CONSTRUCTION STANDARDS	6-7-67	I-I

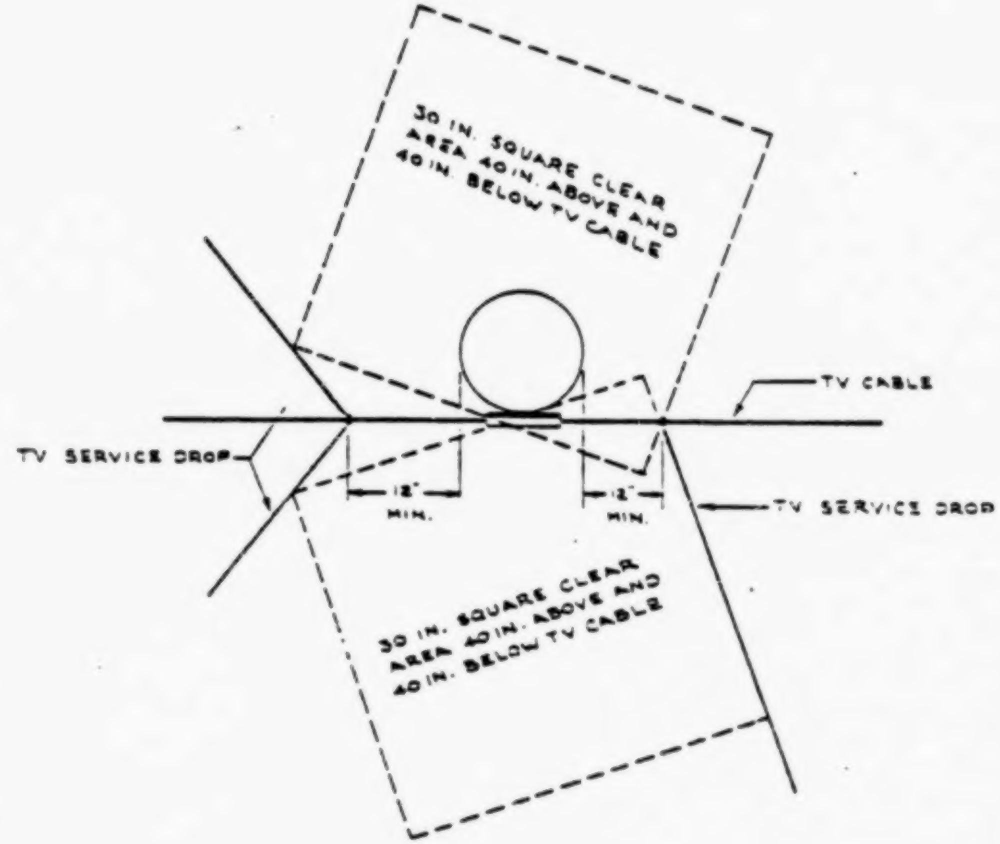


NOTE:
DIMENSION "A" TO BE 45° WHERE PRACTICABLE BUT IN NO CASE SHALL VERTICAL RUN, HAVE A CLEARANCE OF LESS THAN 2 IN. FROM THE NEAREST METAL PART OF THE EQUIPMENT OF ANOTHER USER.

APPD BY DISTR STDS COMMITTEE — CHAIRMAN

ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES
LOCATION OF VERTICAL RUNS

FLORIDA POWER CORPORATION	DISTRIBUTION CONSTRUCTION STANDARDS	6-7-67	7-I-1



APPD BY DISTR STDS COMMITTEE — CHAIRMAN

ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES
CLIMBING SPACE ON JOINTLY USED POLES

FLORIDA POWER CORPORATION	DISTRIBUTION CONSTRUCTION STANDARDS	6-7-67	7-J

[FIRST PAGE OF EXHIBIT C DELETED -- FIRST PAGE OF RESPONSE OF FLORIDA POWER CORPORATION (JAN. 27, 1981) FILED IN TELEPROMPTER CORP., ET AL. V. FLORIDA POWER CORP., PA-81-0008 (COMMON CARRIER BUREAU JULY 16, 1981)]

STATE OF FLORIDA)
COUNTY OF PINELLAS)

FILE NO. PA-81-0008

AFFIDAVIT OF GARY E. CLAYTON

BEFORE ME, the undersigned authority, on this day personally appeared GARY E. CLAYTON, who, after being sworn, deposes and says:

1. My name is Gary E. Clayton. My business address is 3201 34th Street South, St. Petersburg, Florida. I am the Manager for Liason and Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Florida Power").

2. I hold a Bachelor's degree in Electrical Engineering from the Georgia Institute of Technology, Atlanta, Georgia. I have been employed by Florida Power for the past ten years. My experience in that time has included two years in the area of distribution engineering, five years in the area of transmission engineering, and three years in my present position in the Real Estate Department. As Manager for Joint Use Affairs, I am responsible for developing appropriate pole attachment charges and negotiating the terms of pole attachment contracts.

3. I have read and am familiar with a) Sections 1.1401 through 1.1415 of the Rules and Regulations of the Federal Communications Commission, and b) the Complaint filed by Teleprompter Corporation and Teleprompter Southeast, Inc. ("Teleprompter") against Florida Power, File No. PA-80-______. In accordance with Section 1.1407(a), I am making this affidavit for filing as a part of the Response of Florida Power to such Complaint.

4. I have also read the Response of which this affidavit is a part, and I am familiar with the matters contained therein insofar as the Response concerns the rates, terms and conditions of pole attachment agreements to which Florida Power is a party. The facts set forth in such Response and in this affidavit are true and correct to the best of my knowledge and belief.

5. I have obtained all of the data relating to Florida Power operations in this affidavit from the Florida Power Economic Research Group.

6. I have calculated two annual pole attachment rates. The first, determined in accordance with relevant Commission *Reports and Orders* and *Memorandum Opinions and Orders*, is $2.42. The second, determined in accordance with the Florida Power conception of a fair and just rate, is $9.63. Paragraphs 7-18 below explain the derivation of the first rate. Paragraphs 7-17 and 19-21 below explain the derivation of the second rate.

7. A [*sic*] of December 31, 1980, Florida Power gross pole investment was $88,975,480, and pole depreciation reserve was $29,327,582. The first figure will appear under account 364 on Florida Power's Annual Report for 1980 to the Federal Energy Regulatory Commission ("FERC Form 1"). Net pole investment, expressed as gross pole investment less pole depreciation reserve, equalled $59,647,898. Subtraction of 15% of net pole investment to account for investment not essential to CATV results in net bare pole investment of $50,700,713.

8. Florida Power owned 524,044 poles as of November 30, 1980. Its tabulation of poles as of December 31, 1980 has not yet been concluded. Net investment per pole, expressed as the quotient of net investment divided by the number of poles owned by the Florida Power Corporation, was $96,75.

$$\frac{\text{Net Pole Investment}}{\text{Number of Poles}} = \$96.75 = \text{Net Investment per pole}$$

9. The carrying charge is composed of the cost of capital, maintenance expenses, administrative expenses, depreciation, federal and state income taxes, and other taxes. All components are reported as of December 31, 1980. All carrying charges are expressed as a percentage of net pole investment. Net pole investment percentages are calculated by multiplying gross pole investment percentages by 1.4917, the ratio of gross pole investment to net pole investment.

$$\frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = 1.4917$$

10. The cost of capital (return) is the imbedded cost of capital computed by the Florida Public Service Commission method. The figure includes a debt component (long term debt & customer deposits at imbedded rates), an equity component (preferred stock at the imbedded rate and common stock at the allowed 14.6%), and an interest-free component which represents interest-free capital resulting from the deferral of federal income taxes.

Return (Cost of Capital)	% of Capital		Cost of Capital
Long-term Debt	.4567	at	8.81%
Preferred Stock	.1086	at	8.30%
Common Stock	.2929	at	14.6%
Cost Free Deferred Tax Credits	.1280	at	0 %
Customer Deposits—Active	.0136	at	8 %
Customer Deposits—Inactive	.0002	at	0
Composite Cost of Capital			9.31%

11. The maintenance expenses component equals the FERC 593 account divided by the corresponding gross

investment in the FERC 364 & 365 accounts and multiplied by the gross pole/net pole investment conversion ratio. These FERC accounts will appear on Form 1 for 1980.

$$\frac{\text{FERC 593 account}}{\text{FERC 364 \& 365 accounts}} = \frac{\$10{,}581{,}432}{\$166{,}512{,}836} = 6.35\%$$ = Maintenance expense rate for gross investment

6.35% x 1.4917 = 9.48% = Maintenance expense rate for net investment

12. Calculation of administrative expenses begins with the division of total administrative expenses by gross plant investment. Because of the lack of more specific data, the analysis to this point assumes pole administrative expenses are to gross pole investment as total administrative expenses are to gross plant investment. In converting a gross administrative expense rate per pole to a net administrative expense rate per pole, however, such an assumption is no longer necessary. Instead of using a gross plant/net plant investment conversion ratio, a gross pole/net pole investment ratio is used. Both the total administrative expenses and the gross plant investment figures will appear on the FERC Form 1 for 1980.

$$\frac{\text{Total administrative expenses}}{\text{Gross plant investment}} = \frac{\$29{,}943{,}156}{\$2{,}078{,}396{,}138} = 1.44\%$$ = Administrative expense rate for gross investment

1.44% x 1.4917 = 2.15% = Administrative expense rate for net investment

13. The depreciation rate is calculated for straight-line depreciation as the quotient of 1 minus salvage value divided by the average life of 22 years authorized for FERC account 364 by the Florida Public Service Commission.

$$\frac{1 - \text{salvage value}}{22}$$ = Depreciation rate for gross investment

$$\frac{1-0}{22} = 4.55\%$$

4.55% x Ratio = Depreciation rate for net investment

4.55% x 1.4917 = 6.79%

14. The federal and state income tax component equals the income tax paid on the equity portion of the return on investment. The income tax includes the levelized effect of both current and deferred taxes as required under full normalization accounting. The benefits of deferred taxes have been recognized in the calculation of the return. The required return on capital has been reduced by including the interest-free capital component of deferred taxes. The calculation of income taxes below is consistent with the Florida Public Service Commission method, and uses standard levelized fixed charge rate equations for income tax.

Federal and state income tax rate = .487

Debt/equity ratio = .4703

Composite cost of debt = 8.79

Composite cost of capital = 9.31

A/P = Capital recovery

Average life = 22

Depreciation rate for gross investment = 4.55%

$$\text{Income Tax} = \frac{(.487)}{(1-.487)}\left(1 - \frac{(.4703)(8.79)}{9.31}\right)((A/P,\ 9.31\%\ 22\text{years}) - .0455)$$

Income Tax = 3.32%

15. The "other" taxes for net investment are derived in the same way as administrative expenses. The calculation begins with the "other" tax total, comprised largely of property taxes and gross receipts taxes, which will be reported on account 408.10 of the FERC Form 1 for 1980. That figure, less franchise fees, is then divided by the gross plant investment figure which will be reported on the same FERC Form and multiplied by the more specific gross pole/net pole investment conversion ratio.

$$\frac{\text{Other taxes (except for franchise fees)} = \$36{,}940{,}257}{\text{Gross Plant Investment} \quad \$2{,}078{,}396{,}138} = 1.78\% = \text{Other tax rate for gross investment}$$

1.78% x 1.4917 = 2.65% = Other tax rate for net investment

16. Total carrying charges, 33.70% equal the sum of the individual components derived above in paragraphs 10-15:

	% of Net Pole Cost
Return (Cost of Capital)	9.31
Maintenance Expenses	9.48
Administrative Expenses	2.15
Depreciation	6.79
Federal & State Income Taxes	3.32
Other Taxes	2.65
Total	33.70

17. The annual revenue requirement per pole is derived by multiplying the net investment per pole figure in paragraph 8 by the carrying charges percentage in paragraph 16.

$96.75 x 33.7% = $32.60 = Annual revenue requirement per pole

18. If the annual revenue requirement per pole were to be multiplied by 7.41%, the annual pole attachment rental rate would be $2.42.

19. The present pole attachment rate of $6.51 is fair and just. It is much lower than the annual pole cost Teleprompter would incur if it owned its own pole system.

20. It is reasonable to assume that a Teleprompter-owned pole system would resemble closely a telephone-owned pole system, since both only require poles of minimal height. Exhibit C, paragraph 2 of the Complaint shows a General Telephone Company of Florida net investment per pole of $57.18. The carrying costs for telephone pole systems generally exceed those for the Florida Power system. Ac-

cordingly, a conservative estimate of the carrying cost percentage for a Teleprompter-owned system equals the figure derived above for Florida Power. Multiplying net investment per pole by carrying costs yields an annual pole cost for a Teleprompter owned system of $19.27.

$57.18 x 33.7% = $19.27

21. If Teleprompter were to share equally the costs of its pole system with another user, the annual cost for each party would be $9.63, still well above the rate Teleprompter pays to Florida Power. Florida Power, far from abusing its bargaining power, charges Teleprompter less than half of the rate Teleprompter would pay annually for its own system.

22. All CATV rental payments are deposited in a general fund which helps to reduce the overall rate base paid by the utility customer. To require Florida Power to lower its pole rental rates, therefore, would increase the already substantial savings to CATV companies at the expense of utility customers.

23. Teleprompter's anchor attachments are not attachments to poles, ducts, conduits or rights-of-way owned or controlled by Florida Power.

24. For safety reasons, Florida Power does not encourage the use of its anchors by CATV companies. After discovering more than 1000 unauthorized Teleprompter anchor attachments, Florida Power reached a contractual agreement for anchor rentals as a alternative to forcibly removing the attachments.

25. Florida Power requires bonding payments from all cable companies renting pole attachments. Past experience with such companies proves the necessity for the protection bonding payments provide.

Signed this 16th day of January, 1981.

/s/ GARY E. CLAYTON
GARY E. CLAYTON

Sworn to and subscribed before me this 16th day of January, 1981.

/s/ JUDITH A. JENGLING
JUDITH A. JENGLING
Notary Public

EXHIBIT D

Calculation of Maximum Lawful Rate

1. *Net Investment in Bare Poles.* Net investment in bare poles may be expressed as the difference of gross pole investment minus pole depreciation reserve, minus 15% of the investment to reflect that part of the gross plant attributable to crossarms and other items not usable for CATV attachments.

85% (Gross Pole Investment - Pole Depreciation Reserve)

= Net Investment in Bare Poles

85% ($88,975,480 - $29,327,582) = $50,700,713.30

2. *Net Investment Per Bare Pole.* Net investment per bare pole may be expressed as the quotient of net investment in bare pole divided by the number of poles from which net investment is calculated.

$$\frac{\text{Net Investment in Bare Poles}}{\text{Number of Poles}} = \text{Net Investment per Bare Pole}$$

$$\frac{\$50,700,713.3}{524,044} = \$96.75$$

3. *Carrying Charge.* The carrying charge consists of maintenance expense, depreciation, administrative expense, taxes, and cost of capital.

a. *Maintenance Expense.* Maintenance expense for poles may be expressed as a percentage of net investment by dividing the annual pole and conductor maintenance expenses (account 593) by the net investment in poles (account 364) and in overhead conductors (account 365), from which account 593 is derived. Net pole investment consists of gross pole investment less depreciation reserve. Net conductor investment is calculated on the assumption that

conductor depreciation reserve bears the same ratio to plant depreciation reserve as gross conductor investment bares to gross plant investment.

$$\text{Plant Depreciation Reserve} \times \frac{\text{Gross Conductor Investment}}{\text{Gross Plant Investment}} = \text{Conductor Depreciation Reserve}$$

$$\$414{,}191{,}834 \times \frac{\$77{,}537{,}356}{\$2{,}078{,}396{,}138} = \$15{,}451{,}982$$

$$\frac{\text{Pole \& Conductor Maintenance Expenses}}{\left(\begin{array}{c}\text{Gross Pole}\\ \text{Investment}\end{array} - \begin{array}{c}\text{Depreciation}\\ \text{Reserve}\end{array}\right) + \left(\begin{array}{c}\text{Gross Conductor}\\ \text{Investment}\end{array} - \begin{array}{c}\text{Depreciation}\\ \text{Reserve}\end{array}\right)}$$

= Maintenance Expense (expressed as a percentage of net pole investment)

$$\frac{\$10{,}581{,}432}{(88{,}975{,}480 - \$29{,}327{,}582) + (\$77{,}537{,}356 - \$15{,}451{,}982)} = 8.69\%$$

b. *Depreciation.* The depreciation rate may be calculated for straight-line depreciation as the quotient of 1 minus salvage value (as approportion of cost) divided by the useful life of a utility pole.

$$\frac{(1\text{-salvage value})}{22} = \text{Depreciation Rate for Gross Pole Investment}$$

$$\frac{1 - 0}{22} = 4.55\%$$

$$\text{Depreciation Rate for Gross Pole Investment} \times \frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = \text{Depreciation (expressed as a percentage of net pole investment)}$$

$$4.55\% \times \frac{\$88{,}975{,}480}{(\$88{,}975{,}480\text{-}\$29{,}327{,}582)} = 6.79\%$$

c. *Administrative Expense.* FERC Form 1 does not provide figures for administrative expense associated with only poles. We have assumed, for purposes of developing a complete carrying charge, that net pole investment carries the same proportion of such expense as net plant investment. The administrative expense may be expressed as a percentage of net plant investment by dividing the administrative expense by the difference between the gross plant investment and plant depreciation reserve.

$$\frac{\text{Administrative Expenses}}{\left(\begin{array}{c}\text{Gross Plant}\\ \text{Investment}\end{array} - \begin{array}{c}\text{Plant Depreciation}\\ \text{Reserve}\end{array}\right)} = \text{Administrative Expense (expressed as a percentage of net plant investment)}$$

$$\frac{\$29{,}943{,}156}{(\$2{,}078{,}396{,}138 - \$414{,}191{,}834)} = 1.80\%$$

d. *Taxes.* FERC Form 1 does not provide figures for tax expense attributable to pole lines only. It is therefore assumed that net pole investment bears the same proportion of taxes as net plant investment. Tax expense may be expressed as a percentage of net plant by dividing taxes paid by the differences between the gross plant investment and plant depreciation reserve.

$$\frac{\text{Taxes Paid}}{\left(\begin{array}{c}\text{Gross Plant}\\ \text{Investment}\end{array} - \begin{array}{c}\text{Plant Depreciation}\\ \text{Reserve}\end{array}\right)} = \text{Taxes (expressed as percentage of net plant investment)}$$

$$\frac{\$74{,}930{,}556}{(\$2{,}078{,}396{,}138 - \$414{,}191{,}834)} = 4.51\%$$

e. *Cost of Capital* FERC Form 1 does not include a cost of capital figure (return on equity and interest on debt). Therefore, Complainant relies on Respondent's figures set forth in Exhibit C.

9.31%

f. *Total Carrying Charge.* Adding the various percentage components yields a carrying charge of 31.10%.

Maintenance Expense	8.69%
Depreciation	6.79%
Administrative Expense	1.8 %
Taxes	4.51%
Cost of Capital	9.31%
TOTAL CARRYING CHARGE	31.10%

4. *Use Ratio.* The use ratio may be expressed as the quotient of the space occupied by CATV (1 foot) and the total useable space. Since Respondent has not provided any data to calculate useable space, it may be presumed that a reasonable estimate of 13.5 feet may be used. 47

C.F.R. § 1.1409(a); *Memorandum Opinion and Second Report and Order in CC Docket 78-144*, 72 F.C.C. 2d 59, 68-69 (1979); *Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia*, 79 F.C.C.2d 232 (1980).

$$\frac{\text{Space used by CATV}}{\text{Total Useable Space}} = \text{Use Ratio}$$

$$\frac{\text{1 Foot}}{\text{13.5 Feet}} = 7.41\%$$

5. *Maximum Rate*. The maximum rate is the product of net investment per bare pole times carrying charge times use ratio.

Net Investment Per Bare Pole
x Carrying Charge
x Use Ratio
= Maximum Rate

$96.75
x 31.10
x 1/13.5
= $2.23

6. *Sources of Data*. The following table indicates the sources of the various figures used in the calculations.

Table of Location

Item	Document and Page	Location
Gross Plant Investment	Exhibit C, p.4	¶ 12
Plant Depreciation Reserve	FERC Form 1, p.113	Schedule B, Summary of Utility Plant and Accumulated Provisions for Depreciation, Amortization and Depletion, Line No. 13, Column (b)
Pole and Conductor Maintenance Expense	Exhibit C, p.4	¶ 11
Gross Pole Investment	Exhibit C, p.2	¶ 7
Gross Conductor Investment	Exhibit C, pp.2,4	¶¶ 7, 11
Pole Depreciation Reserve	Exhibit C, p.2	¶ 7
Administrative Expense	Exhibit C, p.4	¶ 12
Taxes Paid	FERC Form 1, p.114	Statement of Income for the Year, Lines 11-13, Taxes, Column (c)
Number of Poles Owned	Exhibit C, p.2	¶ 8
Cost of Capital	Exhibit C, p.3	¶ 10

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Complaint have been mailed, postage prepaid, this *20th* day of *February*, 1981, to the following:

ALLAN J. TOPOL
COVINGTON & BURLING
888 Sixteenth St., N.W.
Washington, D.C. 20006

Counsel for Florida Power Corporation

HARRY A. EVERTY, III
Senior Counsel
Florida Power Corporation
P. O. Box 14042
St. Petersburg, Florida 33733

Florida Public Service Commission
Commission Clerk
101 East Gaines Street
Tallahassee, Florida 32301

Federal Energy Regulatory Commission
825 North Capitol Street, N.W.
Washington, D.C. 20426

/s/ SUSAN DIANE MASSIE
SUSAN DIANE MASSIE

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C.

File No. PA-81-0023

In the Matter of

ACTON CATV, INC. d/b/a
BROOKSVILLE PROPERTIES VENTURE
and PASCO ASSOCIATES VENTURE
Complainant,

v.

FLORIDA POWER CORPORATION
Respondent.

TO: The Common Carrier Bureau

RESPONSE OF FLORIDA POWER CORPORATION

Pursuant to Section 1.1407 of the Commission's Rules, Florida Power Corporation ("Respondent") hereby responds to the Complaint of Acton CATV, Inc. d/b/a/ Brooksville Properties Venture and Pasco Associates Venture ("Complainant") filed by Complainant on February 20, 1981.

This response is divided into four parts. In the first part, Respondent answers the specific allegations in the complaint. The second part raises constitutional objections to the Commission grant of the relief requested in the complaint. Notwithstanding these overriding objections, the third part presents two pole attachment rental rates, one calculated in accordance with prior Commission statements on methodology, and a second calculated in accordance with Respondent's conception of a fair and reasonable rate. The fourth and final part makes a number of procedural

requests designed to conserve Commission resources and illuminate particular aspects of this controversy and possible remedies.

Before turning to these specific parts of the response, it is important to fix the context of the dispute. At the heart of the case lies a contract between Complainant and Respondent for the rental of pole space for cable television attachments. The rates established in that contract represent not the dictates of a regulatory regime, but a freely negotiated agreement between Complainant, and Respondent. The agreement benefits Complainant greatly, for the rate now in effect is much lower than the annual costs Complainant would incur if it owned its own pole system. Yet Complainant now asks the Commission to abrogate the contract and impose a rental rate far lower than the negotiated rate. As a public utility providing electric service, Respondent expects governmental regulation of rates charged for provision of that service. Respondent objects, however, to the unwarranted intrusion of the federal government into an area far beyond the bounds of traditional regulation. Commission abrogation of a binding contract for the rental of Respondent's pole space for cable television attachments would be such an unwarranted intrusion.

I. Answers to Allegations in Complaint

1. Respondent is without knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the complaint.

2. Respondent admits the allegations of paragraph 2 of the complaint, except for the allegation that Respondent's general office address is P.0. Box 33101. The correct address is P.O. Box 14042.

3. Respondent denies the allegations of paragraph 3 of the complaint.

4. Respondent admits the allegations of paragraph 4 of the complaint, except for the allegation that "[s]uch poles are used for purposes of wire communications." Some of Respondent's poles are used for wire communications, but many are not.

5. Respondent is without knowledge or information sufficient to form a belief as to the allegations of paragraph 5 of the complaint.

6. Respondent admits the allegations of paragraph 6 of the complaint.

7. Respondent admits the allegations of paragraph 7 of the complaint.

8. Respondent denies the allegations of paragraph 8 of the complaint. Rather than "attempting to charge" Complainant an annual rental of $7.15 per pole, Respondent charges that rate pursuant to contractual agreement with Complainant.

9. Respondent admits the allegations of paragraph 9 of the complaint, except for the allegation that Complainant sought to determine the "lawfulness" of Respondent's rate, which is denied, and the allegation that the Response of Florida Power Corporation in the case of *Teleprompter Corporation and Teleprompter Southeast, Inc.* v. *Florida Power Corporation*, File No. PA-81-0008, is attached to the Complaint, which is denied because only the first page of that Response and the affidavit appended thereto are attached to the Complaint.

10. Respondent denies the allegations of paragraph 10 of the complaint.

11. Respondent denies the allegations of paragraph 11 of the complaint.

12. Respondent denies the allegations of paragraph 12 of the complaint.

13. Respondent denies the allegations of paragraph 13 of the complaint.

14. Respondent denies the allegations of paragraph 14 of the complaint.

15. Respondent denies the allegations of paragraph 15 of the complaint, except for the allegations that the average useful life of a utility pole is 22 years and the depreciation rate for net investment is 6.79%, which are admitted.

16. Respondent denies the allegations of paragraph 16 of the complaint, except for the allegation that the composite cost of capital is 9.31%, which is admitted.

17. Respondent denies the allegations of paragraph 17 of the complaint.

18. Respondent denies the allegations of paragraph 18 of the complaint.

19. Respondent admits the allegation in paragraph 19 of the Complaint that Respondent presently charges a rate of $7.15. Respondent denies the remainder of paragraph 19.

20. Respondent admits the allegation in paragraph 20 of the complaint that the pole attachment agreement for a bonding payment. Respondent denies the remainder of paragraph 20.

21. Respondent denies the allegations of paragraph 21 of the complaint.

II. Affirmative Defenses

22. The Commission should not grant the relief requested because:

A. The relief requested would constitute a taking of private property without just compensation prohibited by the Fifth Amendment of the United States Constitution. The well-established legality of governmental regulation of rates charged for Respondent's provision of electric service in no way alters the unconstitutionality of the proposed governmental intrusion upon Respondent's use of private property for a distinct and heretofore unregulated business purpose.

B. The relief requested would constitute a deprivation of property without due process prohibited by the Fifth Amendment of the United States Constitution.

The legal memorandum attached hereto as Exhibit A further discusses the above defenses.

III. Calculation of Pole Attachment Rates and Conditions

23. Notwithstanding Respondent's overriding objections to Complainant's request for replacement of the contractual rental rate with a rate determined by the Commission, Respondent has calculated a rate in accordance with Commision guidelines announced in *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585 (1978), 72 F.C.C.2d 59 (1979), 77 F.C.C.2d 187 (1980), and applied in the resolution of certain other pole attachment disputes.

24. Attached hereto as Exhibit B is the affidavit of Matthew R. Noble, Manager for Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Affidavit"). The data provided therein are identical to those in the affidavit of Gary E. Clayton ("Clayton affidavit") filed by the Florida Power Corporation in the case of *Teleprompter Corporation and Teleprompter Southeast, Inc.* v. *Florida Power Corporation*, File No. PA-81-0008, and appended to the Complaint in the instant proceeding as Exhibit C, with the following exceptions:

a) The income tax rate is expressed as a function of net investment. In the Clayton affidavit, the income tax rate inadvertently was expressed as a function of gross investment. *See* Affidavit paragraph 14.

(b) The number of poles is provided as of December 31, 1980. In the Clayton affidavit, the number of poles was provided as of November 30, 1980.

(c) As a result of the above two changes, overall carrying charges, net investment per pole, revenue requirement per pole, and the two calculated rental rates differ slightly in the two affidavits.

Paragraphs 25-29 below focus on the flaws in Complainant's rate calculation methodology.

25. Complainant adjusts net pole investment by subtracting 15%, representing an estimate of the investment in items not essential to CATV attachments. Respondent finds the subtraction of investment in items not essential to CATV attachments arbitrary and unreasonable. Net pole investment, without subtractions, should be the base figure from which the cable attachment rental rate is derived. Indeed, 47 U.S.C. § 224(d)(1) speaks of costs "attributable to the entire pole," not the "bare pole." Respondent for the purposes of this calculation deducts 15% from net pole investment in accordance with the Commission determination in *Teleprompter of Fairmont, Inc.* v. *Chesapeake and Potomac Telephone Company of West* Virginia, 47 R.R.2d 1407, 1410 (1980), but in no way accepts the validity of this approach.

26. Complainant uses both plant depreciation reserve and gross investment figures and pole depreciation reserve and gross investment figures in converting pole maintenance expense from a percentage of gross investment to

a percentage of net investment. In contrast, Respondent uses gross pole and net pole investment figures alone for this purpose. Respondent makes assumptions based on total plant statistics only when necessary: since the ratio of gross pole investment to net pole investment is available, Respondent uses that more directly applicable ratio as a conversion factor. *See* Affidavit paragraph 12.

27. Respondent's method of calculating state and federal income taxes departs entirely from the Complainants' tax calculation method. Respondent's methodology is in accordance with the normalized tax methodology used by the Florida Public Service Commission, and avoids the often misleading results of the Complainant's method.[1] Explained in many sources, including American Telephone and Telegraph Company, *Engineering Economy*, 174-79 (3d ed. 1977), Respondent's methodology is conceptually similar to the approach accepted in another pole attachment proceeding, *TeleCable Development Corporation* v. *Appalachian Power Company*, No. 79-0007, ¶ 19 (Common Carrier Bureau, October 31, 1980). *See* Affidavit paragraph 14.

28. The Commission has ruled that cable uses no more than 1 foot of space, and that usable space must include all safety spaces between users. It is respectfully submitted that in defining "usable space" to include safety spaces between users while allowing attribution of no more than one foot of usable space to CATV users, the Commission has misconstrued Congressional intent and dictated the calculation of pole attachment rates which are neither just nor reasonable.[2] As paragraphs 20 and 21 of the Affidavit

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[1] Where a utility has negative income taxes for a given year, for example, Complainant's method would yield a negative income tax carrying charge.

[2] Respondent notes the particular injustice of Commission reliance on agreements which "generally make the CATV operators responsible for all pole replacement costs necessitated by subsequent installation of

show, if Complainant owned its own pole system it would incur considerably higher annual costs—even if it shared those costs with another user—than it now pays Respondent. Where more equitable allocation of "usable space" to CATV would result in a finding that Respondent's current rates are just and reasonable, the Commission's interpretation results in the finding that a rate which already provides Complainant a bargain must be drastically reduced. This reduction would come at the expense of utility users. Through its "usable space" decisions, therefore, the Commission has brushed aside significant countervailing public interests in a single-minded effort to grant CATV companies every conceivable advantage.

29. If a use ratio of 7.41% is employed to complete a calculation of the rental rate consistent with all of the Commission's interpretations, the resulting annual rental rate per pole is $2.51, as compared to the $2.23 requested by the complaint.

30. An annual rate of $10.10 per pole would be a just and reasonable charge for Complainant's use of Respondent's poles. Respondent has developed this rate by positing the existence of an already-constructed pole system owned by Complainant and multiplying conservative estimates of the net investment per pole and carrying costs that system would require. Assuming that Complainant could find another user to share pole costs equally, Complainant would pay an annual rate of $10.10 per pole to maintain its own pole system. *See* Affidavit paragraphs 20-21. That Complainant now pays a far lower rate under

additional electric or telephone lines that reduce available safety space to less than 40 inches." *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d at 71. Respondent's contractual agreements with Complainants contain no such provisions. Section 2.4 of these agreements refers to subsequent cable installation, not subsequent utility installation.

the terms of the agrement reached with Respondent illustrates the justice of the contractual rate and the injustice of Complainant's request for Commission imposition of a still lower rate. It is only fair and just for Respondent's utility customers to share in the savings Complainant derives from using Resondent's pole system rather than maintaining its own.

31. As paragraph 23 of the Affidavit demonstrates, the Complaint's depiction of Complainant as a "reliable" corporation for which a bonding requirement is "unnecessary" is entirely contradicted by a history of failures to make payments on time, and this year, to make payments at all. To cite one example, Pasco Associates Venture in June of 1980 forwarded payment due in June of 1979, but has never forwarded the payment due in June of 1980. Complainant epitomizes the kind of company for which a bonding payment requirement is just, reasonable, and essential.

IV. Procedural Requests

32. Respondent requests that the Commission stay any further action in connection with the complaint in this case until the U.S. Court of Appeals for the D.C. Circuit has entered a decision on the pending appeal, Nos. 80-1483, 80-1490, 80-1499, of the Commission's *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, *supra*. Like this response, the appeal of the Commission's Rules has focused upon the Commissioner's determination that the CATV operator may be charged with only one foot of pole space. Should the D.C. Circuit find merit in the appeal, a previous disposition of the instant complaint would stand to be largely susperseded. A stay therefore would avoid needless waste of the Commission's resources. Upon Commission grant of a stay, the Respondent will reserve sufficient funds to meet the relief requested by the complaint.

33. Respondent requests authority to conduct limited discovery designed to illuminate the likely effects of the

several remedies requested by Complainant. If the Commission determines that Respondent's rates, terms, or conditions are not just and reasonable, Section 1.1410 of the Commission's Rules does not mandate any specific remedy, but rather allows a variety of remedies. The Commission has made liberal use of these remedies in the few pole attachment complaints it has decided. *See, e.g., Teleprompter of Fairmont, supra.* Respondent submits that the decision to "[o]rder a refund, or payment, if appropriate," § 1.1410(c), for example, should rest on a determination that a furtherance of the Congressional aims underlying Section 224 will result. In adopting 47 U.S.C. §224, Congress hoped "to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 95-580, 95th Cong. lst Sess. 14 (1977). It is fully possible that some or all of the remedies the Commission could order would serve only to transfer income from the Respondent's utility users to the Complainant without any beneficial effects on cable television service. Respondent hopes to learn more about the role of pole attachment costs in Complainant's business by inspecting records required by Section 76.305 of the Commission's Rules to be available for public inspection. Nonetheless, only discovery will enable Respondent and the Commission to gauge accurately the likely public benefits, if any, of the remedies sought by Complainant.

34. If the Commission should decide to modify the rental rates provided for in the contract, then Respondent requests that the Commission serve a copy of any final action in this case upon each local body regulating Complainant's cable activities within the geographical area specified in the complaint. The Commission might thereby increase the possibility that any increased revenue received by Complainant would not merely be profit for Complainant, but might also be passed on to Complainant's customers.

Respectfully submitted,

FLORIDA POWER CORPORATION

By /s/ ALLAN J. TOPOL (M.S.B.)
Allan J. Topol

/s/ MICHAEL S. BERNSTEIN
Michael S. Bernstein

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St. Petersburg, Florida 33733

March 23, 1981

Exhibit A

LEGAL MEMORANDUM

Commission Grant of the Relief Requested in the Complaint would Violate the Fifth Amendment of the United States Constitution by Taking Respondent's Property without Just Compensation and by Depriving Respondent of Property without Due Process of Law

As interpreted by the Commission in *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C. 2d 1585 (1978), 72 F.C.C. 2d 59 (1979), 77 F.C.C. 2d 187 (1980), and applied in the resolution of certain other pole attachment disputes, the Pole Attachment Act, 47 U.S.C. § 224, allows the Respondent to charge cable television companies no more than \$2.51—or according to Complainant's calculations, \$2.23—annually per pole for the use of Respondent's poles, and thereby injures Respondent's right to rent space on its property at terms it finds satisfactory. This right constitutes "property" for the purpose of the Fifth Amendment's injunction against taking of private property for public use without just compensation:

> "The term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership].' *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). It is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denotes[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . .

> The constitutional provision is addressed to every sort of interest the citizen may possess.' *Id.*, at 377-378."

Pruneyard Shopping Center v. *Robins*, 447 U.S. 74, 82 n.6 (1980).

In determining whether particular injuries to property are "takings" under the Fifth Amendment, the Supreme Court has engaged in essentially "ad hoc, factual inquiries", *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

> "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' *United States* v. *Eureka Mining Co.*, 357 U.S. 155, 168 (1958)."

Id.

Where the particular circumstances of a case support the conclusion that the challenged governmental action either "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land,. . . ." *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980), a Fifth Amendment "taking" has occurred. Under the former test, the government has "taken" property unless its action both responds to the requirements of a substantial public interest and employs means reasonably necessary to the advancement of that interest. *Penn Central, supra*, 438 U.S. at 127 ("a use restriction on real property may

constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose"); *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594-95 (1962) (" 'To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals' ") (quoting *Lawton* v. *Steel*, 152 U.S. 133, 137 (1894)); *Chatham* v. *Jackson*, 613 F.2d 73, 78 (5th Cir. 1980) ("First, the public's interest must require the regulation. Second, the means must be reasonably necessary to accomplish the goal and not 'unduly oppressive' to individuals."). In *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), for example, the Supreme Court struck down the application of a zoning ordinance to the plaintiff's property as not bearing a substantial relation to the public health, safety, morals, or general welfare.

In reporting the Pole Attachment Act, the U.S. Senate Committee on Commerce, Science, and Transportation cited two purposes: "To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 95-580, 95th Cong. lst Sess. 14 (1977). Commission grant of the relief requested in the Complaint would substantially advance neither the above two purposes, nor, indeed, any purpose required by the public interest.

The rates Respondent charges Complainant are fair, just and reasonable. As Paragraph 30 of the Response and Paragraphs 20-21 of the Affidavit show, if Complainant already owned its own pole system, the annual cost of upkeep would be $20.20 per pole. If Complainant could find another party to share its pole system, the annual cost to Complainant would be $10.10 per pole. The rate Respondent charges Complainant is nearly three dollars

less than the cost Complainant would incur by sharing the carrying charges of its own system with another party.

Complainant nonetheless requests the Commission to prohibit the current rate and all others exceeding 7.41%—a figure derived from the arbitrary assignment of only one foot of pole space to cable use—of Respondent's costs as unfair and unreasonable. If the public interest requires such governmental intervention, it also must require all sales and rentals of private property to be made at cost. The existing regulation of rates Respondent charges for the provision of electrical service cannot explain why complainant—unlike other buyers and renters—requires federal assurance of rock bottom prices at the expense of a private party's property rights. Like the rates Respondent charges in its employee cafeteria, or the rates a wholly unregulated company charges for its services, pole space rental rates have always rested in the property owner's discretion. Constitutional removal of pole attachment rates from Respondent's control requires more than a finding that existing rates, while affording Complainant a bargain, do not afford Complainant all the advantages Respondent's electrical power consumers derive from traditional utility regulation.[1]

The relief requested, then, cannot advance the purpose of preventing unfair pole attachment practices because Respondent's current practices are fair. For the same reason, the relief requested cannot advance the purpose of

[1] Like the argument based on existing regulation of Respondent's electric rates, arguments based on evidence recorded in the Pole Attachment Act's legislative history fail to explain why the public interest requires giving Complainant, in contrast to other private buyers and renters, the use of private poles at cost. The Senate Committee noted evidence that utilities are in a position to extract unreasonably high rates and that the practices of telephone companies present the danger of competitive restraint, S. Rep. No. 95-580, 95th Cong. lst Sess. 13 (1977), but Respondent does not extract unreasonably high rates and is not a telephone company.

minimizing the effect of unjust pole attachment practices on the development of cable television services. The proposed means for achieving this second purpose suffer from an additional defect: there are no grounds for believing that the transfer of funds effected by the requested relief would spur cable television service. No evidence has been introduced to show that the continuation of Complainant's local cable service depends on the level of pole attachment rates. Indeed, Complainant apparently has operated successfully to date despite—or more appropriately, with the aid of—the contractual rate. Similarly, no evidence has been introduced to show that Complainant would use the additional funds to expand cable operations in Florida or elsewhere. Complainant well might distribute these funds as profit, or invest them in enterprises entirely unrelated to cable.

The only predictable effect of mandating a new rate, then, would be an increase in Complainant's funds. Quite apart from the injustice of asking Respondent to subsidize the growth of cable television, therefore, Commission grant of the relief requested might aid Complainant without in any way aiding cable or the public interest. This tenuous connection between means and ends in the Pole Attachment Act sharply contrasts with the more carefully tailored governmental actions considered and upheld in previous "takings" cases. *See, e.g. Andrus* v. *Allard*, 444 U.S. 51 (1979) (Eagle Protection Act forbids commerce in eagles after effective date); *Penn Central, supra* (program to preserve historical landmarks restricts development of privately owned historical landmarks).

The relief requested, in sum, would serve no public interest, much less substantially advance a purpose required by the public interest. The taking clause of the Fifth Amendment will not countenance an uncompensated taking serving only to enrich one private party at another's expense.

The defects inhering in Commission grant of the relief requested, as discussed above, in addition would violate the Fifth Amendment by depriving Respondent of property without due process of law. *See generally Pruneyard, supra*, at 84-85; *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124-25 (1978).

Respectfully submitted,

FLORIDA POWER CORPORATION

By /s/ ALLAN J. TOPOL (M.S.B.)
Allan J. Topol

/s/ MICHAEL S. BERNSTEIN
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St. Petersburg, Florida 33733

March 23, 1981

Exhibit B

STATE OF FLORIDA)
COUNTY OF PINELLAS)

FILE NO. PA-81-0023

AFFIDAVIT OF MATTHEW R. NOBLE

BEFORE ME, the undersigned authority, on this day personally appeared Matthew R. Noble, who, after being sworn, deposes and says:

1. My name is Matthew R. Noble. My business address is 3201 34th Street South, St. Petersburg, Florida. I am the Manager for Liason and Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Florida Power").

2. I hold a Bachelor's degree in Engineering Technology from the University of South Florida, Tampa, Florida, and an Associate of Science degree in Electronics from St. Petersburg Junior College, St. Petersburg, Florida. I have been employed by Florida Power for the past eight years. My experience in that time has included one year in the area of system planning, four years in the area of scheduling and coordination, and three years in the Real Estate Department. As Manager for Joint Use Affairs, I am responsible for developing appropriate pole attachment charges and negotiating the terms of pole attachment contracts.

3. I have read and am familiar with a) Sections 1.1401 through 1.1415 of the Rules and Regulations of the Federal Communications Commission, and b) the Complaint filed by Acton CATV, Inc. d/b/a/ Brooksville Properties Venture

and Pasco Associates Venture ("Acton") against Florida Power, File No. PA-81-0023. In accordance with Section 1.1407(a), I am making this affidavit for filing as a part of the Response of Florida Power to such Complaint.

4. I have also read the Response of which this affidavit is a part, and I am familiar with the matters contained therein insofar as the Response concerns the rates, terms and conditions of pole attachment agreements to which Florida Power is a party. The facts set forth in such Response and in this affidavit are true and correct to the best of my knowledge and belief.

5. I have obtained all of the data relating to Florida Power operations in this affidavit from the Florida Power Economic Research Group.

6. I have calculated two annual pole attachment rates. The first, determined in accordance with relevant Commission *Reports and Orders* and *Memorandum Opinions and Orders*, is $2.51. The second, determined in accordance with the Florida Power conception of a fair and just rate, is $10.10. Paragraphs 7-18 below explain the derivation of the first rate. Paragraphs 7-17 and 19-21 below explain the derivation of the second rate.

7. As of December 31, 1980, Florida Power gross pole investment was $88,975,480, and pole depreciation reserve was $29,327,582. The first figure will appear under account 364 on Florida Power's Annual Report for 1980 to the Federal Energy Regulatory Commission ("FERC Form 1"). Net pole investment, expressed as gross pole investment less pole depreciation reserve, equalled $59,647,898. Subtraction of 15% of net pole investment to account for investment not essential to CATV results in net bare pole investment of $50,700, 713.

8. Florida Power owned 528,655 poles as of December 31, 1981. Net investment bare per pole, expressed as the quotient of net bare pole investment divided by the number

of poles owned by the Florida Power Corporation, was $95.91.

Net Bare Pole Investment / Number of Poles	=	$95.91	=	Net Investment per bare pole

9. The carrying charge is composed of the cost of capital, maintenance expenses, administrative expenses, depreciation, Federal and state income taxes, and other taxes. All components are reported as of December 31, 1980. All carrying charges are expressed as a percentage of net pole investment. Net pole investment percentages are calculated by multiplying gross pole investment percentages by 1.4917, the ratio of gross pole investment to net pole investment.

$$\frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = 1.4917$$

10. The cost of capital (return) is the imbedded cost of capital computed by the Florida Public Service Comission method. The figure includes a debt component (long term debt & customer deposits at imbedded rates), an equity component (preferred stock at the imbedded rate and common stock at the allowed 14.6%), and an interest-free component which represents interest-free capital resulting from the deferral of federal income taxes.

Return (Cost of Capital)	% of Capital		Cost of Capital
Long-term Debt	.4567	at	8.81%
Preferred Stock	.1086	at	8.30%
Common Stock	.2929	at	14.6%
Cost Free Deferred Tax Credits	.1280	at	0%
Customer Deposits—Active	.0136	at	8%
Composite Cost of Capital			9.31%

11. The maintenance expenses component equals the FERC 593 account divided by the corresponding gross pole investment in the FERC 364 & 365 accounts and multi-

plied by the gross pole/net pole investment conversion ratio. These FERC accounts will appear on FERC Form 1 for 1980.

FERC 593 account / FERC 364 & 365 accounts	=	$ 10,531,432 / $166,512,836	=	6.35%	=	Maintenance expense rate for gross investment

6.35% x 1.4917 = 9.48% = Maintenance expense rate for net investment

12. Calculation of administrative expenses begins with the division of total administrative expenses by gross plant investment. Because of the lack of more specific data, the analysis to this point assumes pole administrative expenses are to gross pole investment as total administrative expenses are to gross plant investment. In converting a gross administrative expense rate per pole to a net administrative expense rate per pole, however, such an assumption is no longer necessary. Instead of using a gross plant/net plant investment conversion ratio, a gross pole/net pole investment ratio is used. Both the total administrative expenses and the gross plant investment figures will appear on the FERC Form 1 for 1980.

Total administrative expenses / Gross plant investment	=	$29,943,156 / $2,078,396,138	=	1.44%	=	Administrative expense rate for gross investment

1.44% x 1.4917 = 2.15% = Administrative expense rate for net investment

13. The depreciation rate is calculated for straight-line depreciation as the quotient of 1 minus salvage value divided by the average life of 22 years authorized for FERC account 364 by the Florida Public Service Commission.

$$\frac{1 - \text{salvage value}}{22} = \text{Depreciation rate for gross investment}$$

$$\frac{1 - 0}{22} = 4.55\%$$

4.55% x Ratio = Depreciation rate for net investment

4.55% x 1.4917 = 6.79%

14. The federal and state income tax component equals the income tax paid on the equity portion of the return on investment. The income tax includes the levelized effect of both current and deferred taxes as required under full normalization accounting. The benefits of deferred taxes have been recognized in the calculation of the return: the required return on capital has been reduced by including an interest-free capital component of deferred taxes. The calculation of income taxes below is consistent with the Florida Public Service Commission method and uses standard levelized fixed charge rate equations for income tax.

Federal and state income tax rate = .487
Debt/equity ratio = .4703
Composite cost of debt = 8.79
Composite cost of capital = 9.31
A/P = capital recovery
Average life = 22
Depreciation rate for gross investment = 4.55%

$$\text{Income Tax} = \left(\frac{.487}{1 - .487}\right)\left(1 - \frac{(.4703)(8.79)}{9.31}\right)\left((A/P,\ 9.31\%,\ 22\text{ yrs.}) - 0.455\right)$$

Income Tax = 3.32% = Income tax rate for gross investment

3.32% x 1.4917 = 4.95% = Income tax rate for net investment

15. The "other" taxes for net investment are derived in the same way as administrative expenses. The calculation begins with the "other" tax total, comprised largely of property taxes and gross receipts taxes, which will be reported on account 4.08.10 of the FERC Form 1 for 1980. That figure, less franchise fees, is then divided by the gross plant investment figure which will be reported on

the same FERC Form and multiplied by the more specific gross pole/net pole investment conversion ratio.

$$\frac{\text{Other taxes (except for franchise fees)}}{\text{Gross Plant Investment}} = \frac{\$\ 36{,}940{,}257}{\$2{,}078{,}396{,}138}$$

$$= 1.78\% = \text{Other rate for gross investment}$$

1.78% x 1.4917 = 2.65% = Other tax rate for net investment

16. Total carrying charges, 35.33%, equal the sum of the individual components derived above in paragraphs 10-15:

	% of Net Pole Cost
Return (Cost of Capital)	9.31
Maintenance Expense	9.48
Administrative Expense	2.15
Depreciation	6.79
Federal & State Income Taxes	4.95
Other Taxes	2.65
Total	35.33

17. The annual revenue requirement per pole is derived by multiplying the net investment per pole figure in paragraph 8 by the carrying charges percentage in paragraph 16.

$95.91 x 35.33% = $33.88 = Annual revenue requirement per pole

18. If the annual revenue requirement per pole were to be multiplied by 7.41%, the annual pole attachment rental rate would be $2.51.

19. The present pole attachment rate of $7.15 is fair and just. It is much lower than the annual pole cost Acton would incur if it owned its own already-constructed pole system.

20. It is reasonable to assume that an Acton-owned pole system would resenble closely a telephone-owned pole sys-

tem, since both only require poles of minimal height. Exhibit C, paragraph 2, of the Complaint in the case of *Teleprompter Corporation and Teleprompter Southeast Corporation, Inc. v. Florida Power Corporation*, File No. PA-81-008, appended hereto as Exhibit A, showed a General Telephone Company of Florida net investment per pole of $57.18. The carrying costs for telephone pole systems generally exceed those for the Florida Power system. Accordingly, a conservative estimate of the carrying cost percentage for an Acton-owned system equals the figure derived above for Florida Power. Multiplying net investment per pole by carrying costs yields an annual pole cost for an Acton-owned system of $20.20.

$57.18 x 35.33% = $20.20

21. If Acton were to share equally the costs of its pole system with another user, the annual cost for each party would be $10.10, still well above the rate Acton pays to Florida Power. Florida Power, far from abusing its bargaining power, charges Acton less than half of the rate Acton would pay annually for its own system.

22. All CATV rental payments are deposited in a general fund which helps to reduce the overall rate base paid by the utility customer. To require Florida Power to lower its pole rental rates, therefore, would increase the already substantial savings to CATV companies at the expense of utility customers.

23. Florida Power requires bonding payments from all cable companies renting pole attachments. Past and present experience with cable companies in general, and Acton in particular, proves the necessity for the protection bonding payments provide. Acton has been delinquent in its payments since the beginning of its contractual relationship with Florida Power. Not only have Pasco Associates Venture and Brookville Properties Venture failed to make payments due January 1, 1981, but Pasco Associates Venture has yet to make payments due June 30, 1980. Pasco

Associates Venture did make a payment on June 5, 1980: that payment was due June 30, 1979.

Signed this 19th day of March, 1981

/s/ MATTHEW R. NOBLE
MATTHEW R. NOBLE

Sworn to and subscribed before me
this 19th day of March, 1981.

/s/ Illegible
Notary Public

My Commission Expires:
December 28, 1983

AFFIDAVIT EXHIBIT A

EXHIBIT C

Calculation of Maximum Lawful Rate

1. *Net Investment in bare Poles.* Net investment in bare poles may be expressed as the difference of gross pole investment minus pole depreceiation reserve, less an additional 15% to reflect that part of the gross plant attributable to c[illegible] arms and other items not usable for CATV attachme[illegible]. It is assumed that the pole depreciation reserve bears the same ratio to gross pole investment as the total plant depreciation reserve bears to total plant investment.

$$\frac{\text{Plant Depreciation Reserve}}{\text{Gross Plant Investment}} = \text{Ratio of Pole Depreciation Reserve to Gross Pole Investment}$$

$$\frac{\$414{,}191{,}834}{\$2{,}043{,}936{,}824} = 20.3\%$$

20.3% x Gross Pole Investment = Pole Depreciation Reserve

20.3% x $81,841,613 = $16,613,847

85% x (Gross Pole Investment - Pole Depreciation Reserve) = Net Investment in Bare Poles

85% x ($81,841,613 - $16,613,847) = $55,443,601

2. *Net Investment Per Bare Pole.* Net investment per bare pole may be expressed as the quotient of net investment in bare poles divided by the number of poles.

$$\frac{\text{Net Investment in Bare Poles}}{\text{Number of Poles}} = \text{Net Investment per Bare Pole}$$

$$\frac{\$55{,}443{,}601}{?} = ?$$

Because the number of poles owned by Respondent is not publicly available, it is assumed that Respondent's net investment per bare pole is no greater than that of its geographic neighbor, General Telephone Company of Florida.

From information available on FCC Form M for the year ending December 31, 1979, General Telephone's net investment per pole can be shown to be $57.18, following the formula prescribed by the Commission in Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, No. 80-372 (F.C.C., July 19, 1980). Gross pole investment is $11,915,853. Form M at 19 line 11, col. (h). The ratio of the pole depreciation reserve to gross pole investment can be estimated by finding the ratio of the depreciation reserve for all plant to gross plant investment.

$$\frac{\text{Plant Depreciation Reserve}}{\text{Gross Plant Investment}} = \frac{\$387{,}662{,}630}{\$1{,}770{,}647{,}179} = 21.9\%$$

Form M at 12 line 6, col.(c) & 19 line 23, col.(b).

21.9% x Gross Pole Investment = Pole Depreciation Reserve

21.9% x $11,915,853 = $2,609,572

85% x (Gross Pole Investment -Pole Depreciation Reserve) = Investment in bare Poles

85% x (11,915,853 - 2,609,572) = $7,910,339

$$\frac{\text{Net Investment in Bare Poles}}{\text{Number of Poles}} = \text{Net Investment per Bare Pole}$$

$$\frac{\$7{,}910{,}339}{138{,}332} = \$57.18$$

Number of poles: Form M at 74 line 1, col. (n).

3. *Carrying Charge.* Carrying Charge is composed of maintenance expenses, depreciation, administrative expense, taxes, and cost of capital.

a. *Maintenance Expense.* Maintenance expense for poles may be expressed as a percentage of net investment by dividing the annual pole maintenance expense by the net pole investment (gross pole investment less depreciation reserve).

$$\frac{\text{Pole Maintenance Expense}}{\left(\begin{array}{c}\text{Gross Pole}\\ \text{Investment}\end{array} - \begin{array}{c}\text{Depreciation}\\ \text{Reserve}\end{array}\right)} = \text{Maintenance Expense (expressed as a percentage of net pole investment)}$$

$$\frac{\$8,107,911}{(\$81,841,613 - \$16,513,847)} = 12.4\%$$

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Response" have been mailed, postage prepaid, this 23rd day of March, 1981, to the following:

Gardner F. Gillespie, Esq.
Hogan & Hartson
815 Connecticut Avenue
Washington, D.C. 20006
Attorney for Complainant

Florida Public Service Commission
Commission Clerk
101 East Gaines Street
Tallahassee, Florida 32301

Federal Energy Regulatory Commission
825 North Capitol Street, N.W.
Washington, D.C. 20426

/s/ Michael S. Bernstein
Michael S. Bernstein

March 23, 1981

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

File No. PA-82-0005

In re

COX CABLEVISION CORP. d/b/a
HIGHLANDS CABLE TV,

Complainant,

v.

FLORIDA POWER CORP.,

Respondent.

To: The Common Carrier Bureau

COMPLAINT

Parties

1. Complainant Cox Cablevision Corp. d/b/a Highlands Cable TV owns and operates a cable television system serving the communities of Avon Park, Sebring, and unincorporated areas of Highlands and Marion County, Florida. The address of Complainant's is P. O. Box 229, Sebring, Florida, 33870.

2. Respondent Florida Power Corp. is engaged in the provision of electric power service in portions of the State of Florida. Respondent's general office address is 3201 - 34th Street South, P. O. Box 14042, St. Petersburg, Florida, 33733.

Jurisdiction

3. The Commission has jurisdiction over this complaint and over Respondent pursuant to Section 224 and other

provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et. seq* (1970).

4. Respondent owns or controls utility poles in Florida. Such poles are used for purposes of wire communications. Complainants* allege, upon information and belief, that Respondent is not owned by any railroad, any person who is cooperatively organized, or any person owned by the federal government or any state.

5. Complainants allege, upon information and belief, and in reliance upon Commission lists published pursuant to § 1.1414(b) of the Commission's Rules, that neither the State of Florida, nor any of its political subdivisions, agencies, or instrumentalities, has certified to the Commission that it regulate the rates, terms, or conditions of pole attachments. The Florida Supreme Court has held that attempts by the Florida Public Service Commission to regulate pole attachments exceeded the Commission's jurisdiction. *TelePrompter Corp.* v. *Hawkins*, No. 56, 291 (Fla., May 29, 1980).

Service

6. Attached hereto is a certificate of service on Respondent and each federal, state, or local government agency which regulates any aspect of service provided by Respondent.

Agreement

7. In 1963 an agreement with Respondent was entered by which it was agreed that space would be made available on Respondent's poles for pole attachments as defined in § 1.1402(b) of the Commission's Rules. That agreement is attached hereto as Exhibit A. Pursuant to the agreement, Complainant was charged an annual rental of $5.50.**

* Complainant is successor in interest to Highlands Cablevision Co. by virtue of its acquisition of the subject cable systems in 1969.

8. In 1978, Respondent approached Complainant with a proposed rate increase from $5.50 to $6.86. The parties entered into negotiation over the new rate, but were unsuccessful in reaching an agreement. Accordingly, by letter of March 20, 1979 (attached as Exhibit B), Respondent suspended Complainant's rights under the 1963 agreement insofar as additional pole attachments are concerned. Complainant's attachments in existence at that time, however, have remained on the poles and from 1979 through the most recent semi-annual invoicing in June, 1981, Respondent has charged Complainant in accordance with § 8.1 of the 1963 agreement, a provision governing rates in the event of a dispute over an increase. Despite Respondent's purported suspension of rights, the terms and conditions of the 1963 agreement appear to have continued governing all other aspects of the relationship between the parties. As of June 30, 1981, there were 2033 poles subject to this agreement.

Unjust and Unreasonable Rates

9. In 1979, pursuant to a provision in the agreement governing rates in the event of a dispute, Respondent began charging Complainant at the rate of $11.47 per pole. Complainant has, however, continued to pay at the original rate of $5.50 per pole. As will be demonstrated below, under the formula made applicable by Section 224(d)(1) of the Communications Act and Section 1.1409(c) of the Commission's Rules, not only the $11.47 rate currently being charged, but also the $6.86 rate proposed by Respondent in 1978 and the $5.50 rate which Complainant has been paying, are unjust and unreasonable. As the Commission recently ruled in *TelePrompter Corp.* v. *Florida Power Corp.*, (PA-81-008, July 16, 1981), and as the statutory formula establishes in this case, the maximum lawful rate that Respondent may charge for cable television pole attachments is $1.79 per pole.

10. The parties in this proceeding have been engaged in intermittent efforts to negotiate a settlement to their

dispute since 1978. From time to time, Complainant has requested and received data from Respondent, but much of that information is either inadequate for purposes of the Commission's formula or out of date. In August, 1981, Complainant again approached Respondent in an effort to reinstitute negotiations for a new rate. Because those efforts were firmly rebuffed (*See* Exhibit C) and because the necessary data has recently been produced by Respondent or developed by the Commission in response to other complaints and is now a matter of public record before the Commission, Complainant is relying on that information rather than making a superfluous request of Respondent for essentially the same data. The sources of individual items of information are identified in Exhibit D.

11. The first step in determining the maximum lawful rate is the calculation of the annual revenue requirement per pole. Respondent's figure for gross investment in pole plant, set forth in Exhibit D, includes poles, crossarms, and all appurtenant equipment whether or not used or useful for attachment of television cables. This figure must be reduced by the depreciation reserve from gross investment in pole plant to yield net investment in pole plant, and must be further reduced to remove net investment in crossarms and other equipment not used or useful for pole attachments. The calculations are set forth in Exhibit D.

12. Investment per bare pole must be multiplied by an annual carrying charge, expressed as a percentage, to determine the annual revenue requirement per pole. There are five components of the annual carrying charge: (1) cost of capital; (2) maintenance expense; (3) administrative costs; (4) depreciation; and (5) taxes. These components are derived in Exhibit D. The revenue requirement per pole is the product of the net investment per bare pole times the annual carrying charge.

13. To calculate what share of that revenue requirement the Respondent may charge to cable systems, it is necessary to determine two factors: the space used for a cable attachment and the average usable space per pole. As the Commission has found, there is no dispute that a CATV cable actually uses or occupies one foot of space. *Second Report and Order in CC Docket 78-114*, 72 F.C.C.2d 59, 70 n.26 (1979), *aff'd on reconsid.*, 77 F.C.C.2d 187, 190 (1980). No safety zones or other clearances may properly be assigned to the cable operator. 72 F.C.C.2d at 70. The Commission has also determined that, in the absence of other information, it is to be presumed that an average pole has 13.5 feet of usable space. 72 F.C.C. 2d at 69; *TelePrompter of Fairmont, Inc.* v. *Chesapeake & Potomac Tel. Co. of W. Va.*, 79 F.C.C.2d 232 (1980). *TelePrompter Corporation* v. *Northwestern Bell Telephone Co.*, Mimeo 000345 at ¶ 8 (Common Carrier Bureau, rel. April 21, 1981). In *TelePrompter Corporation* v. *Florida Power Corp.*, the Commission found the usable space per pole for this Respondent was 13.5 feet and the space occupied by the cable attachment was one foot, or 7.41 percent of the usable space on Respondent's poles.

14. Therefore, as set forth in Exhibit D, the maximum lawful annual rate which Respondent may charge is the product of its net investment per pole ($95.91) times its annual carrying charge (25.236%) times the percentage of usable space occupied (7.41%). Accordingly, as the Commission found in the *TelePrompter* case, the maximum just and reasonable rate permissible under 47 U.S.C. §224(b)(1) is 1.79 per pole. Any rates charged by Respondent in excess thereof are unjust and unreasonable, and therefore unlawful. *TelePrompter Corporation* v. *Northwestern Bell Telephone Co., supra.*

15. As explained above, Respondent is attempting to charge Complainant an annual rental rate of $11.47 or $6.86 per pole. Complainant submits that either rate is

unlawful in that it exceeds the calculated maximum lawful annual rate.

Settlement Efforts

16. As noted above, efforts to resolve this dispute have been on-going since 1978, and by letter of September 2, 1981, Respondent made it clear that further settlement negotiations would prove fruitless.

17. Complainant respectfully requests that:

a. The Commission determine that the maximum rate Respondent may lawfully charge is $1.79 per pole per year;

b. The present rate, being in excess thereof, be terminated pursuant to 47 C.F.R. §1.1410(a);

c. The Commission, pursuant to 47 C.F.R. §1.1410(b), substitute an annual rate of $1.79 per pole in the agreement attached hereto as Exhibit A or in such other agreement the parties may enter; and

d. Respondent be ordered, pursuant to 47 C.F.R. §1.1410(c), to refund to Complainant the amount Complainant has paid to Respondent in excess of the maximum lawful rate for the period from the date hereof, plus interest.

Respectfully submitted,

COX CABLEVISION CORP. d/b/a/
HIGHLANDS CABLE TV

By /s/ Charles H. Helein (D.C.G.)
Charles H. Helein

/s/ Donna C. Gregg
Donna C. Gregg

Its Attorneys

Of Counsel:

Dow, Lohnes & Albertson
1225 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-8000

November 2, 1981

Exhibit A

ATTACHMENT AGREEMENT BETWEEN FLORIDA POWER CORPORATION AND HIGHLANDS CABLEVISION COMPANY (A Division of McLendon Cablevision Company)

Section 0.1 THIS AGREEMENT, made and entered into this 20th day of June, 1963, by and between Florida Power Corporation, a corporation organized and existing under the laws of the State of Florida, herein referred to as the "Electric Company," and Highlands Cablevision Company, a corporation organized and existing under the laws of the State of Florida, herein referred to as the "Television Company."

WITNESSETH

Section 0.2 WHEREAS, the Television Company proposes to furnish television distribution service to residents of Avon Park, Florida, and surrounding service area, and will need to erect and maintain aerial cables, wires and associated appliances throughout the area to be served and desires to attach such cables, wires and appliances to poles of the Electric Company.

Section 0.3 WHEREAS, the Electric Company is willing to permit, to the extent it may lawfully do so, the attachment of said cables, wires and appliances to its existing poles where, in its judgment, such use will not interfere with its own service requirements, including consideration of economy and safety.

Section 0.4 NOW THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained,

the parties hereto for themselves and for their successors and assigns do hereby mutually covenant and agree as follows:

ARTICLE I

SCOPE OF AGREEMENT

Section 1.1 This agreement shall be in effect in the portion of Highlands County including the City of Avon Park and the surrounding area in which the Electric Company provides distribution service.

Section 1.2 The Electric Company reserves the right to deny the attachments of cables, wires and appliances to its poles by the Television Company which have been installed for purposes other than or in addition to normal distribution of electric service including, among others, poles which in the judgment of the owner (i) are required for the sole use of the owner, (ii) would not readily lend themselves to attachments by the Television Company because of interference, hazards or similar impediments, present or future, or (iii) have been installed primarily for the use of a third party.

Section 1.3 Pursuant to the right provided for in the foregoing section, the Electric Company hereby excludes its poles used to support its transmission lines and having no attachments thereon for local electric distribution.

ARTICLE II

PLACING, TRANSFERRING OR REARRANGING ATTACHMENTS

Section 2.1 Before making attachment to any pole or poles of the Electric Company, the Television Company shall make application and receive a permit therefore in the form of Exhibit A, hereto attached and made a part hereof.

Section 2.2 The Television Company shall, at its own expense, make and maintain said attachments in safe condition and in thorough repair, and in a manner suitable to the Electric Company and so as will not conflict with the use of said poles by the Electric Company, or by other utility companies using said poles, or interfere with the working use of facilities thereon or which may from time to time be placed thereon. The Television Company shall at any time, at its own expense, upon notice from the Electric Company, relocate, replace or renew its facilities placed on said poles, and transfer them to substituted poles, or perform any other work in connection with said facilities that may be required by the Electric Company; provided, however, that in cases of emergency, the Electric Company may arrange to relocate, replace or renew the facilities placed on said poles by the Television Company, transfer them to substituted poles or perform any other work in connection with said facilities that may be required in the maintenance, replacement, removal or relocation of said poles, the facilities thereon or which may be placed thereon, or for the service needs of the Electric Company, and the Television Company shall, on demand, reimburse the Electric Company for the expense thereby incurred. Nothing in this paragraph is to relieve the Television Company of maintaining adequate work forces readily at hand to promptly repair, service and maintain the Television Company's facilities where such condition is hindering the Electric Company's operations.

Section 2.3 The Television Company's cables, wires and appliances, in each and every location, shall be erected and maintained in accordance with the requirements and specifications of the National Electrical Safety Code, or any amendments or revisions of said Code. Drawings marked Exhibits C to J, inclusive, when not in conflict with specifications of the Electric Company, attached hereto and made a part hereof, are descriptive of required construction under some typical conditions, where span lengths are

not over three hundred fifty feet (350') and voltage between any conductor and ground does not exceed eight thousand seven hundred (8,700) volts.

Section 2.4 In the event that any pole or poles of the Electric Company to which the Television Company desires to make attachments are inadequate to support the additional facilities in accordance with the aforesaid specifications, the Electric Company will indicate on said Exhibit A the changes necessary to provide adequate poles and the estimated cost thereof to the Television Company and return it to the Television Company and if the Television Company still desires to make the attachments and returns the Exhibit marked to so indicate together with an advance payment to reimburse the Electric Company for the entire estimated non-betterment portion of the cost and expense thereof, including the increased cost of larger poles, sacrificed life value of poles removed, cost of removal less any salvage recovery and the expense of transferring the Electric Company's facilities from the old to the new poles, the Electric Company will replace such inadequate poles with suitable poles. Where the Television Company's desired attachments can be accommodated on present poles of the Electric Company by rearranging the Electric Company facilities thereon, the Television Company will compensate the Electric Company in advance for the full estimated expense incurred in completing such rearrangements. The Television Company will also in advance reimburse the Owner or Owners of other facilities attached to said poles for any expense incurred by it or them in transferring or rearranging said facilities. Any strengthening of poles (guying) required to accommodate the attachments of the Television Company shall be provided by and at the expense of the Television Company and to the satisfaction of the Electric Company. The Television Company shall not set intermediate poles under or in close proximity to the Electric Company's facilities. The Television Company may, however, request the Electric

Company to set such intermediate poles as the Television Company may desire, and the Electric Company shall have the option to accept or reject such request. If such request is granted, the Television Company shall reimburse the Electric Company for the full cost of setting such pole or poles.

Section 2.5 The Electric Company reserves to itself, its successors and assigns, the right to maintain its poles and to operate its facilities thereon in such manner as will best enable it to fulfill its own service requirements, and in accordance with the National Electrical Safety Code or any amendments or revisions of said Code and such specifications particularly applying to the Electric Company hereinbefore referred to. The Electric Company shall not be liable to the Television Company for any interruption to service of the Television Company or for interference with the operation of the cables, wires and appliances of the Television Company arising in any manner out of the use of the Electric Company's poles hereunder.

Section 2.6 The Television Company shall exercise special precautions to avoid damage to facilities of the Electric Company and of others supported on said poles; and hereby assumes all responsibility for any and all loss for such damage caused by the Television Company. The Television Company shall make an immediate report to the Electric Company of the occurrence of any damage and hereby agrees to reimburse the Electric Company for the expense incurred in making repairs. Damage to plant or facilities of the Television Company or damage to equipment of subscriber to the Television Company's service, arising from accidental contact with the Electric Company's energized conductors, shall be assumed by the Television Company.

ARTICLE III

EVIDENCE TO OPERATE FROM GOVERNMENT AND MUNICIPAL AUTHORITIES

Section 3.1 The Television Company shall submit to the Electric Company evidence, satisfactory to the Electric Company, of its authority to erect and maintain its facilities within public streets, highways and other thoroughfares and shall secure any necessary consent from state or municipal authorities or from the owners of property to construct and maintain facilities at the locations of poles of the Electric Company which it desires to use.

ARTICLE IV

RIGHT OF WAY FOR TELEVISION COMPANY'S ATTACHMENTS

Section 4.1 While the Electric Company and the Television Company will cooperate as far as may be practicable in obtaining rights of way for both parties on the Electric Company's poles, no guarantee is given by the Electric Company of permission from property owners, muncipalities or others for use of poles and right of way easement by the Television Company, and if objection is made thereto and the Television Company is unable to satisfactorily adjust the matter within a reasonable time, the Electric Company may at any time upon thirty (30) days notice in writing to the Television Company, require the Television Company to remove its attachments from the poles involved and its appliances from the right of way easement involved and the Television Company shall, within thirty (30) days after receipt of said notice, remove its attachments from said poles and its appliances from said right of way easement at its sole expense. Should the Television Company fail to remove its attachments and applicances, as herein provided, the Electric Company way remove them without liability for loss or damage and the Television

Company shall reimburse the Electric Company for the expense incurred.

ARTICLE V

INSPECTION

Section 5.1 The Electric Company, because of the importance of its service, reserves the right to inspect each new installation of the Television Company on its poles and in the vicinity of its line or appliances and to make periodic inspections, semiannually or oftener [*sic*] as plant conditions may warrant, of the entire plant of the Television Company; and the Television Company shall, on demand, reimburse the Electric Company for the expense of such inspections at the rate equal to the present or future hourly rate of a journeyman lineman plus loading costs per manhour. Such inspections, made or not, shall not operate to relieve the Television Company of any responsibility, obligation or liability assumed under this agreement. Provided, however, that such inspections, as to payment by the Television Company to the Electric Company, shall be limited to not more than one inspection each calendar year during the period covered by the agreement.

Section 5.2 Bills for inspections, expenses and other charges under this agreement, except those advance payments specifically covered herein, shall be payable within thirty (30) days after presentation. Non-payment of bills shall constitute a default of this agreement.

Section 5.3 The Television Company shall furnish bond to guarantee the payment of any sums which may become due to the Electric Company for rentals, inspections or for work performed for the benefit of the Television Company under this agreement including the removal of attachments upon termination of this agreement by any of its provisions; as provided on the attached Schedule of Required Bond Coverage.

ARTICLE VI

ABANDONMENT AND REMOVAL OF ATTACHMENTS

Section 6.1 The Television Company may at any time remove its attachments from any pole or poles of the Electric Company, but shall immediately give the Electric Company written notice of such removal in the form of Exhibit B, hereto attached and made a part hereof. No refund of any rental will be due on account of such removal, nor proration made for less than one-half year.

Section 6.2 Upon notice from the Electric Company to the Television Company that the use of any pole or poles is forbidden by municipal authorities or property owners, the permit covering the use of such pole or poles shall immediately terminate and the cables, wires and appliances of the Television Company shall be removed at once from the affected pole or poles.

Section 6.3 If the Television Company shall fail to comply with any of the provisions of this agreement including the specifications hereinbefore referred to, or default in any of its obligations under this agreement and shall fail within thirty (30) days after written notice from the Electric Company to correct such default or non-compliance, the Electric Company may, at its option, forthwith terminate this agreement or the permit covering the poles as to which such default or non-compliance shall have occurred. In case of such termination, a proportionate refund of all prepaid rentals shall be made.

ARTICLE VII

RENTAL AND PROCEDURE FOR PAYMENTS

Section 7.1 The Television Company shall pay to the Electric Company, for attachments made to poles under this

agreement, a rental at the rate of Five Dollars and Fifty Cents ($5.50) per pole per year. Said rental shall be payable semiannually in advance on the first day of January and the first day of July of each year during which this agreement remains in effect. Semiannual rental payments shall be based upon the number of poles on which attachments are being maintained on the first day of June and the first day of December, respectively. The first payment of rental hereunder shall include such prorata amount as may be due for use of poles for the effective date hereof.

ARTICLE VIII

PERIODICAL REVISION OF ATTACHMENT PAYMENT RATE

Section 8.1 At the expiration of three (3) years from the date of this agreement and at the end of every three (3) year period thereafter, the rate per attachment per pole shall be subject to revision at the request of either party made in writing to the other not later than sixty (60) days before the end of any such three (3) year period. If within sixty (60) days after the receipt of such request by either party from the other, the parties hereto fail to agree upon a revision of such rate, the then adjustment rate per pole to be paid during the next three (3) year period shall be (i) the rate per pole in effect for the then current three (3) year period, or (ii) an amount equal to one-half of the then average annual total cost per pole of installing and maintaining the standard poles on which the Television Company has attachments whichever amount is higher. In case of a revision of the adjustment rate as herein provided, the new rate shall be applicable until again revised.

ARTICLE IX

DEFAULTS

Section 9.1 If the Television Company shall default in any of its obligations under this agreement and such default

shall continue for thirty (30) days after notice thereof in writing from the Electric Company, all rights of the Television Company hereunder shall be suspended including its right to occupy the Electric Company's poles, and if such default shall continue for a period of thirty (30) days after such suspension, the Electric Company hereunder may forthwith terminate this agreement.

ARTICLE X

LIABILITY

Section 10.1 As a safeguard in respect to the foregoing agreement, the Television Company will carry Workmen's Compensation Insurance in the maximum amounts required by statute and will also carry policies of insurance acceptable to the Electric Company with respect to (i) general liability with bodily injury limits not less than $200,000 each person and $500,000 each accident and with property damage limits not less than $50,000 each accident and $100,000 aggregate and (ii) automobile and bodily injury limits not less than $200,000 each person and $500,000 each accident and with property damage limits not less than $25,000. The Television Company will cause these insurance policies mentioned in (i) and (ii) respectively to be endorsed by the Television Company's insurance carrier to provide blanket contractual coverage expressly with respect that the Television Company will assume full responsibility for the work and labor to attach cables, wires and appliances to poles of the Electric Company and will defend the Electric Company and hold the Electric Company harmless against and indemnify the Electric Company for any and all accidents or damages or claims or costs whatsoever arising within the scope thereof or in carrying out this agreement irrespective of negligence, actual or claimed, on the part of the Electric Company to the full limits of and for the liabilities insured under said policies. Prior to the Television Company making any at-

tachments to poles of the Electric Company, the Television Company will furnish the Electric Company with certificates acceptable to the Electric Company from the Television Company's insurance carrier showing that the Television Company carries the requisite insurance and that the specified policies have been endorsed as above provided. Said certificates shall also provide that such insurance shall not be terminated, changed or endorsed except upon twenty (20) days written notice thereof to the Electric Company.

ARTICLE XI

EXISTING RIGHTS OF OTHER PARTIES

Section 11.1 Nothing herein contained shall be construed as affecting the rights or privileges previously conferred by the Electric Company, by contract or otherwise, to others, not parties to this agreement, to use any poles covered by this agreement; and the Electric Company shall have the right to continue and extend such rights or privileges. The attachment privileges herein granted shall at all times be subject to such existing contracts and arrangements.

ARTICLE XII

TERM OF AGREEMENT

Section 12.1 This agreement shall become effective upon its execution and if not terminated in accordance with the provisions of Section 6.3 shall continue in effect for a term of not less than one (1) year. Either party may terminate the agreement at the end of said year or at any time thereafter by giving to the other party at least six (6) months written notice. Upon termination of the agreement in accordance with any of its terms, the Television Company shall immediately remove its cables, wires and ap-

pliances from all poles of the Electric Company. so removed, the Electric Company shall have the right to remove them at the cost and expense of the Television Company and without any liability therefore.

ARTICLE XIII

ASSIGNMENT OF RIGHTS

Section 13.1 The Television Company shall not assign, transfer or sublet the privileges hereby granted without the prior consent in writing of the Electric Company.

Section 13.2 No use, however extended, of the Electric Company's poles, under this agreement, shall create or vest in the Television Company any ownership or property rights in said poles, but the Television Company's rights therein shall be and remain a mere license. Nothing herein contained shall be construed to compel the Electric Company to maintain any of said poles for a period longer than demanded by its own service requirements. The Electric Company reserves the right to deny the licensing of certain poles to the Television Company.

ARTICLE XIV

WAIVER OF TERMS OR CONDITIONS

Section 14.1 Failure to enforce or insist upon compliance with any of the terms or conditions of this agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate, and their corporate seals to be affixed thereto, by their respective officers thereunto duly authorized, on the day and year first above written.

(Seal) Attest	FLORIDA POWER CORPORATION
By /s/ Illegible Secretary	By /s/ H. K. McKean Senior Vice President
(Seal) Attest	Highlands Cablevision Company, Inc.
By /s/ Illegible Assistant Secretary	By /s/ Illegible President

SCHEDULE OF REQUIRED BOND COVERAGE

Number of Attachments	Amount of Coverage
0 - 500	$ 5,000
501 - 1000	$10,000
1001 - 1500	$15,000
1501 - 2000	$20,000
2001 - 2500	$25,000
Over 2500	$35,000

EXHIBIT A

ATTACHMENT RENTAL CONTRACT FOR TELEVISION COMPANY CABLE SYSTEM HIGHLANDS CABLEVISION COMPANY - FLORIDA POWER CORPORATION

Application and Permit

__________, 19 ____

____

In accordance with the terms of agreement dated ____, 19 ____, application is hereby made for license to make attachments to the following poles:

Location: City __________ County__________, Florida

Pole Number	Pole Locations (Describe Fully)

By ____________________

Title ____________________
Highlands Cablevision Company

License granted __________, 19____, subject to your approval of the following changes and rearrangements at an estimated cost to your of $________ payable in advance,

License denied under Section 13.2, __________, 19____.

The above changes and rearrangements approved and advance payment therefore enclosed

By ____________________

Title ____________________

____

By ____________________
Title ____________________

Permit No. ____________
Total Previous Poles ______
Poles This Permit ________
New Total ____________

EXHIBIT B

ATTACHMENT RENTAL CONTRACT FOR TELEVISION COMPANY CABLE SYSTEM HIGHLANDS CABLEVISION COMPANY - FLORIDA POWER CORPORATION

Notification of Removal by Television Company

__________, 19____

____

In accordance with the terms of agreement dated ____, 19____, kindly cancel from your records the following poles covered by Permit No. __________ from which attachments were removed on __________, 19____.

Location: City __________ County __________, Florida

Pole Number	Permit No.	Pole Location

By ____________________

Title ____________________
Highlands Cablevision Company

Notice Acknowledged

__________, 19____

By ____________________

Title ____________________

Notice No. ____________________

Total Poles Discontinued This Notice ______

Poles Previously Vacated ____________

Total Poles Vacated to Date ____________

Exhibit B

FLORIDA
POWER
CORPORATION

March 20, 1979

CERTIFIED MAIL

Mr. Robert O. Frier, Manager
Highlands Cable Television Corporation
Post Office Box 229
Sebring, FL 33870

Dear Mr. Frier:

Semi-Annual Billing for Attachments on Poles of Florida Power Corporation for Period January 1, through June 30, 1979

January 4, 1979 we sent a letter and invoice for billing in amount of \$11,371.43, covering television distribution attachments in the Avon Park, Florida area. February 15, 1979, a letter was sent to your company acknowledging receipt of your Check #59477, in the amount of \$5,549.50. We accepted this check as partial payment and advised Highlands Cable Television Corporation that you were now delinquent in payment in the amount of \$5,821.93. You were further advised your company was in default of our attachment agreement dated June 20, 1963.

This default has continued for a period of over thirty (30) days after notice in writing to you from Florida Power Corporation. Therefore, in accordance with the provisions of Section 9.1 of the aforementioned agreement, Florida Power Corporation suspends all-rights of the television company including its right to occupy the electric company's poles.

We have been attempting for over a year to negotiate a mutually acceptable rental attachment rate with your company and remain optimistic that this matter will eventually be resolved. However, during the interim period we are requesting our division engineering office in Lake Wales to allow no further attachments by the television company to poles of Florida Power Corporation.

Very truly yours,

FLORIDA POWER CORPORATION

/s/ W. H. Osborne
W. H. Osborne
Joint Use Specialist
Real Estate Department

WHO/jc
cc: Mr. T.S. Ricketts

Exhibit C

FLORIDA
POWER
CORPORATION

September 2, 1981

Claus Kroeger
Cox Cable Communication
Business Manager
219 Perimeter Center Pkwy
Atlanta, Ga. 30346

Mr. Kroeger:

This is to acknowledge receipt of your letter dated 8-11-81. As you may not be aware, from reading your letter, Cox Cable (Highlands Cable Television Corp.) is under suspension as defined under Section 8.1 of the contract dated 6-20-63 between Florida Power Corporation and Highlands Cable Television Corporation. Under this aforementioned agreement the rate of $11.47 was established and is now being invoiced. It appears Section 8.1 of the contract was invoked by Florida Power Corporation after lengthy negotiation failed to conclude a mutual agreement. This section of the contract was reluctantly used by Florida Power Corporation after a final attempt to compromise through establishing an equitable pole rate of $6.86 was refused by Cox Cable.

In light of the present review action being taken by the Common Carrier Bureau of the FCC, we have not changed our position as the rate now requested of $6.86/pole annually. Florida Power Corporation is maintaining that this annual attachment rate is fair and just.

As of this date your outstanding balance is $40,738.73, which should be cleared up prior to addressing any further mutual resolution.

On behalf of Florida Power Corporation I would like to thank you for any assistance you are able to render in rectifying this situation.

Sincerely,

/s/ M. RICHARD NOBLE
M. RICHARD NOBLE

Manager Liaison &
Joint Use Affairs
Real Estate Dept., H-5

MRN/jit

EXHIBIT D

Calculation of Maximum Lawful Rate

1. *Net Investment in Bare Poles.* Net investment in bare poles may be expressed as the difference of gross pole investment less pole depreciation reserve (net pole investment), less 15% of the net pole investment to take into account that part of the pole plant attributable to crossarms and other items not usable for CATV attachments.

$ 88,975,480	Gross Pole Investment
29,327,582	Pole Depreciation Reserve
$ 59,647,898	Net Pole Investment
x85%	(15% of Investment for Non-CATV facilities)
$ 50,700,713	Net Investment in Bare Poles

2. *Net Investment Per Bare Pole.* Net investment per bare pole may be expressed as the quotient of net investment in bare poles divided by the number of poles from which net investment is calculated.

$\frac{\$\ 50{,}700{,}713}{528{,}655}$ = Net Investment in Bare Poles / Poles

= $ 95.91 Net Investment Per Pole.

3. *Carrying Charge.* The carrying charge consists of rate of return, maintenance expense, administrative expense, depreciation, and taxes.

a. *Rate of Return*: In *TelePrompter Corp.* v. *Florida Power Corp.*, PA-81-0008, Respondent specified and the Commission accepted a rate of return of 9.31%.

b. *Maintenance Expenses*: Maintenance expense for poles may be expressed as a percentage of net investment by dividing the annual expense of overhead line maintenance by the sum of the gross pole investment, investment in overhead conductors and devices and the cost of services. This figure is then multiplied by The Gross-to-Net Pole Investment Conversion Ratio.

(1)	$ 8,975,480	Gross Pole Investment
	+77,357,356	Investment in Overhead Conductors/ Devices
	+69,424,614	Services
	$156,757,450	

(2) $\frac{\$\ 10{,}581{,}432}{\$156{,}757{,}450}$ Overhead Line Maintenance Expense = 4.48%

(3) 4.48%
x 1.4917 (Gross-to-Net Pole Investment Ratio)
6.69%

c. *Administrative Expense*: Administrative Expense, as a percentage of net pole investment, is expressed by dividing Total Administrative Expense by Total Gross Plant Investment and multiplying that figure by the Gross-to-Net *Plant* Conversion Ratio:

(1)	$ 8,018,299	Administrative & General Salaries
	3,459,402	Office Supplies and Expenses
	(-29,030)	Administrative Expenses Transferred
	305,316	Regulatory Commission Expenses
	$ 11,753,917	Total Administrative Expense

(2) $\frac{\$\ 11{,}753{,}917}{2{,}078{,}396{,}138}$ = 0.56%

(3) 0.56% x 1.297 = 0.726%

d. *Depreciation*: In *TelePrompter Corp.* v. *Florida Power Corp.* (PA-81-008), *supra*, Respondent claimed and the Commission accepted a depreciation rate of 6.79% [Quotient of 1 minus salvage value (0) divided by an average useful life of 22 years] multiplied by the Gross-to-Net Pole Investment Ratio Factor:

(1) $\frac{1 - 0}{22}$ = 4.55%

(2) 4.55% x 1.4917 = 6.79%

e. *Taxes*: Taxes are expressed as a percentage of net pole investment by dividing the total of federal income

tax, state income tax, and ad valorem taxes *actually paid* by the gross plant investment. This figure is then multiplied by the Gross-to-Net Plant Conversion Ratio. It is assumed that net pole expense bears the same relationship to tax expense as it does to net plant investment.

(1) $ 1,123,825 State Income Taxes
+(-26,867,971) Federal Income Tax
+ 53,373,765 Ad Valorem Taxes
27,629,619 Total Taxes Paid

(2) $\frac{27,629,619}{2,078,396,138} = 1.32\%$

(3) 1.32% x 1.297 = 1.72%

f. *Total Carrying Charges*:

9.31%	Rate of Return
6.69%	Maintenance Expense
0.726%	Administrative Expense
6.79%	Depreciation
1.72%	Taxes
25.236%	TOTAL CARRYING CHARGES

4. *Use Ratio*. The use ratio may be expressed as the quotient of the space occupied by CATV (1 foot) divided by the total usable space (13.5 feet). *See TelePrompter Corp.* v. *Florida Power Corp.*, PA-81-008, *supra*.

$$\frac{\text{1 Foot}}{\text{13.5 Feet}} = 7.41\%$$

5. *Maximum Rate*. The maximum rate is the product of the net investment per bare pole times the carrying charge times the use ratio.

$ 95.91	Net Investment Per Bare Pole
x 25.236%	Carrying Charge
x 7.41%	Use Ratio
$ 1.79	

SOURCE OF DATA

Item	Figure	Source
Gross Pole Investment	$88,975,480	FERC Form 1 (Dec. 31, 1980), Electric Plant in Service, p. 402, l. 59, col. (g)
Pole Depreciation Reserve	$29,327,582	*Id.*, Schedule B, Summary of Utility and Accumulated Provisions for Depreciation, Amortization, and Depletion, p. 113, 1. 13, col. (b)
Number of Bare Poles	528,655	Respondent's Affidavit in "Motion for Leave to File" of March 25, 1981. FCC File No. PA-81-008, p. 3, 8
Rate of Return	9.31%	Respondent's Affidavit in "Response" of Jan. 27, 1981 in PA-81-008, p. 3, ¶10
Maintenance of Overhead Lines	$10,581,432	FERC Form 1 (Dec. 31, 1980) Acct. 593 p. 419, 1. 118
Investment in Poles, Towers, Fixtures	$88,975,480	FERC Form 1 (Dec. 31, 1980) Acct. 364 Electric Plant in Service p. 402, 1. 59, col. (g)
Investment in Overhead Conductors, Devices	$77,537,356	*Id.*, p. 402, 1. 60, col. (g)
Services	$69,424,614	*Id.*, p. 402, 1. 64, col. (g)

Administrative & General Salaries	$ 8,018,229	FERC Form 1 (Dec. 31, 1980), Electric Operating & Maintenance Expense, Acct. 920 p. 419, 1. 150, col. (b)
Office Supplies & Expenses	$ 3,459,402	*Id.*, Acct. 921 p. 419, 1. 151, col. (b)
Administrative Expenses Transferred (Credit)	($-29,030)	*Id.*, Acct. 922 p. 419, 1. 152, col. (b)
Regulatory Commission Expenses	$305,316	*Id.*, Acct. 928 p. 419, 1. 158, col. (b)
Gross Electric Plant Investment	$2,078,346,138	FERC Form 1 (Dec. 31, 1980) Statement B, Summary of Utility Plant and Accumulated Provisions for Depreciation, Amortization, and Depletion p. 113, 1. 7, col. (b)
Plant Depreciation Reserve	$475,940,294	*Id.* p. 113, 1. 13, col. (b)
Ad Valorem Taxes	$53,373,765	FERC Form 1 (Dec. 31, 1980) Statement of Income for Year Acct. 408.1 p. 113, 1. 11, col. (c)
Federal Income Taxes	($-26,867,971)	*Id.*, Acct. 409.1 p. 113, 1. 12, col. (c)
State Income Taxes	($1,123,825)	*Id.*, p. 113, 1. 13, col. (c)

AFFIDAVIT

I, G.L. Davenport, an officer of Cox Cablevision Corp., on oath do state that I have read the foregoing complaint attached hereto; that I am familiar with the matters contained therein and know the purpose thereof; and that the facts set forth therein are true and correct to the best of my knowledge, information and belief.

/s/ G. L. Davenport
G. L. Davenport

Subscribed and sworn to before me
this 23 day of October, 1981.

/s/ JAMES A. NATHAN
Notary Public
My commission expires on:
August 23, 1985

AFFIDAVIT

I, G.L. Davenport, do hereby depose and state that I am Vice-President of Cox Cablevision Corp. d/b/a Highlands Cable T.V.; that I have reviewed the attached Complaint; that I am familiar with the matters set forth therein; and that the facts and circumstances as set forth are true and correct to the best of my knowledge, information, and belief.

/s/ G. L. Davenport
G. L. Davenport

Subscribed and sworn to before me
this 23 day of October, 1981.

/s/ James A. Nathan
Notary Public

My commission expires on
August 23, 1985

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the attached "Complaint" has been sent this 2nd day of November, 1981, by first-class United States mail, postage prepaid, to the following:

Florida Power Corp.
3201 - 34th Street South
P.O. Box 14042
St. Petersburg, Florida 33733
Attn: M. Richard Noble
Manager Liaison & Joint Use Affairs
Real Estate Dept., H-5

/s/ Donna C. Gregg
Donna C. Gregg, Esquire
Dow, Lohnes & Albertson
1225 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20036
(202) 862-8075

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

File No. PA-82-0005

In the Matter of

COX CABLEVISION CORP. d/b/a
HIGHLANDS CABLE TV
Complainant,

v.

FLORIDA POWER CORPORATION
Respondent.

TO: The Common Carrier Bureau

RESPONSE OF FLORIDA POWER CORPORATION

Pursuant to Section 1.1407 of the Commission's Rules, Florida Power Corporation ("Respondent") hereby responds to the complaint of Cox Cablevision Corp. d/b/a/ Highlands Cable TV ("Complainant") filed on November 2, 1981.

This response is divided into four parts. In the first part, Respondent answers the specific allegations in the complaint. The second part raises constitutional objections to the Commission grant of the relief requested in the complaint. Notwithstanding these overriding objections, the third part presents two pole attachment rental rates, one calculated in accordance with prior Commission statements on methodology, and a second calculated in accordance with Respondent's conception of a fair and reasonable rate. The fourth and final part makes procedural and remedial requests designed to insure that any Commission action

comports with the goals of the Pole Attachment Act, 47 U.S.C. § 224 (Supp. II 1978).

Before turning to these specific parts of the response, it is important to fix the context of the dispute. At the heart of the case lies a contract between Complainant and Respondent for the rental of pole space for cable television attachments. Rates charged in accordance with that contract represent not the dictates of a regulatory regime, but a freely negotiated agreement between Complainant, and Respondent. The agreement benefits Complainant greatly, for the rate now in effect is much lower than the annual costs Complainant would incur if it owned its own pole system. Yet Complainant now asks the Commission to abrogate the contract and impose a rental rate far lower than the rate negotiated in 1963, when the costs of pole maintenance were a fraction of what they are today. As a public utility providing electric service, Respondent expects governmental regulation of rates charged for provision of that service. Respondent objects, however, to the unwarranted intrusion of the federal government into an area far beyond the bounds of traditional regulation. Commission abrogation of a binding contract for the rental of Respondent's pole space for cable television attachments would be such an unwarranted intrusion.

I. Answers to Allegations in Complaint

1. Respondent is without knowledge or information sufficient to respond to the allegations of paragraph 1 of the complaint.

2. Respondent admits the allegations of paragraph 2 of the complaint.

3. Respondent denies the allegations of paragraph 3 of the complaint.

4. Respondent admits the allegations of paragraph 4 of the complaint, except for the allegation that "[s]uch poles are used for purposes of wire communications." Some of

Respondent's poles are used for wire communications, but many are not.

5. Respondent admits the allegation in paragraph 5 of the complaint that the Florida Supreme Court has held that regulation of pole attachments is outside of the Florida Public Service Commission's current jurisdiction. Respondent is without knowledge or information sufficient to form a belief as to the remainder of paragraph 5.

6. Respondent denies the allegations of paragraph 6 of the complaint. Respondent received a certificate of service listing only Respondent.

7. Respondent admits the allegations of paragraph 7 of the complaint.

8. Respondent admits the allegations of paragraph 8 of the complaint, except for the allegation that "[d]espite Respondent's purported suspension of rights, the terms and conditions of the 1983 agreement appear to have continued governing all other aspects of the relationship between the parties." Pursuant to Section 9.1 of the 1963 agreement, Respondent did not purport to suspend, but did suspend Complainant's rights for default in its obligations. Because Respondent has not taken the further contractual option of terminating the agreement, the agreement continues to apply.

9. Respondent denies the allegations of paragraph 9, except for the allegations that Respondent has been charging Complainant at the rate of $11.47 per pole and Complainant has been paying Respondent at the rate of $5.50 per pole.

10. Respondent admits the allegations of paragraph 10, except for the allegations that Respondent has supplied inadequate data to Complainant and that Respondent has rebuffed Complainant's effort to negotiate. Respondent has supplied detailed data and continues to be willing to negotiate a just and reasonable rate.

11. Respondent denies the allegations of paragraph 11 of the complaint.

12. Respondent denies the allegations of paragraph 12 of the complaint.

13. Respondent denies the allegations of paragraph 13 of the complaint.

14. Respondent denies the allegations of paragraph 14 of the complaint.

15. Respondent denies the allegations of paragraph 15 of the complaint.

16. Respondent denies the allegations of paragraph 16 of the complaint.

17. Respondent denies the allegations of paragraph 17 of the complaint.

II. Affirmative Defenses

18. The Commission should not grant the relief requested because:

A. Congress did not grant the Commission authority to amend, modify or abrogate pole attachment contracts in existence prior to the effective date of the Communications Act Amendments of 1978, such as the agreement at issue between Complainant and Respondent.

B. The relief requested would constitute a taking of private property without just compensation prohibited by the Fifth Amendment of the United States Constitution. The well-established legality of governmental regulation of rates charged for Respondent's provision of electric service in no way alters the unconstitutionality of the proposed governmental intrusion upon Respondent's use of private

property for a distinct and heretofore unregulated business purpose.

C. The relief requested would retroactively nullify the terms of a contract in existence prior to the effective date of the Communications Act Amendments of 1978, and thereby would constitute a deprivation of property without due process prohibited by the Fifth Amendment of the United States Constitution.

The legal memorandum attached hereto as Exhibit A further discusses the above defenses.

III. Calculation of Pole Attachment Rates and Conditions

19. Notwithstanding Respondent's overriding objections to Complainant's request for replacement of the contractual rental rate with a rate determined by the Commission, Respondent has calculated a rate in accordance with the Commission guidelines announced in *Adoption of Rules for the Regulation of Cable Television Pole Attachments,* 68 F.C.C. 2d 1585 (1978), 72 F.C.C.2d 59 (1979), 77 F.C.C.2d 187 (1980), and applied in the resolution of certain other pole attachment disputes.

20. Attached hereto as Exhibit B is the affidavit of Matthew R. Noble, Manager for Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Affidavit"). The Affidavit and the following paragraphs focus primarily on the flaws in Complainant's rate calculation methodology.

21. In calculating carrying charges, the complaint derives a tax component of 1.72%, an administrative expense component of .726% and a rate of return of 9.31%. The correct components, respectively, are 7.6%, 1.87%, and

14.6%. Use of these components results in a rate of $2.67 rather than the $1.79 Complainant advocates.[1]

22. In accordance with the methodology approved by the Florida Public Service Commission ("FPSC"), Respondent uses standard levelized fixed charge rate equations to calculate the federal and state income tax component of carrying charges, 7.6%. *See* Affidavit paragraph 16. Complainant would supplant Respondent's customary state-sanctioned tax methodology with a taxes paid methodology in order to derive a component of 1.72%.

23. In *Teleprompter of Fairmont,* the respondent forwarded carrying charges without providing "specific information about its data source or the respective amounts in the various categories." 79 F.C.C.2d at 236. The Commission therefore calculated a rate based on publicly available information, the taxes paid reported on the respondent telephone company's Form M. *Id.* The Commission gave no indication that taxes paid should be used to derive the tax component of carrying charges even where a respondent submits and fully explains a component based on a state-sanctioned methodology.

24. *Cable Information Services, Inc.* v. *Appalachian Power Co.,* 81 F.C.C.2d 383 (1980) ("*C.I.S.*"), the only Commission decision involving a power company's pole attachment rental rates, indicates that the Commission had not intended *Teleprompter of Fairmont* to announce a rigid adherence to a taxes paid methodology. In *C.I.S.*, Appalachian supplied a tax component of 3.47% without any explanation of its derivation, Complaint Attachment B Appendix A. Cable Information Services accepted this figure, Complaint at G, as did the Commission. 81 F.C.C.2d at 389 n.6. While the derivation of the 3.47% figure was

[1] Both rates rely on December 31, 1980 data. Respondent soon will have available December 31, 1981, data, which more accurately reflects costs at the time the complaint was filed. Respondent will submit this more recent data to the Commission as soon as it becomes available.

never explained or questioned, it appears that this figure reflected a methodology of the kind Respondent advocates. As the Commission noted, *id.* at 387 n.3, Appalachian attempted to modify the tax component it had offered initially on the grounds that the cost of capital had changed. A levelized tax rate—but not a tax component based on actual taxes paid—would change in response to a change in the cost of capital. Appalachian's calculation in another pole attachment proceeding, *Wytheville Tablecable* v. *Appalachian Power Co.*, 48 R.R.2d 684 (Common Car. Bur. 180), supports the inference that the Commission accepted a levelized tax computation in C.I.S.[2] In *Wytheville,* the same Appalachian manager who supplied undocumented figures to Cable Information Services provided figures with explanatory materials to complainant Dublin Associates, Ltd. The tax rate clearly was calculated according to a levelized rate methodology. Dublin Complaint Attachment B Exhibit D.

25. As the Commission has emphasized, *C.I.S.*, 81 F.C.C.2d at 388, citing S. Rep. No. 95-580, 95th Cong. 1st Sess. 20 (1977), Congress intended that the pole attachment program be simple and expeditious and that the Commission defer to cost methodologies sanctioned by state or local regulatory authorities. Complainant's use of actual taxes paid as the basis for calculating the tax component of carrying charges conflicts with both aspects of Congressional intent.

26. Respondent's tax payments, like those of other power companies, fluctuate sharply from year to year. *See* Affidavit paragraph 18. If the Commission sets a rate based on a power company's high taxes paid for one year, affected cable companies will be eager to file new complaints the following year if, as will often be the case, the power

[2] In *C.I.S.*, at 388 n. 4, the Commission similarly used Appalachian's pleadings in another case to make inferences about methodological questions Appalachian had not answered in the case at hand.

company's taxes paid drop significantly. Similarly, it would be in the interest of the Respondent in the instant case to file a complaint against Complainant next year if its taxes paid rise. Far from furthering simplicity and expedition, then, Complainant's method encourages the annual renewal of complaints. Respondent's method would avoid such waste of private and public resources by keeping the tax component on a relatively even keel.

27. By ignoring established state practice, Complainant's method would contravene express Congressional intent:

> "Since the rate-setting formula set forth in S. 1547, as reported, merely establishes a methodology for assigning pole costs, however determined, under applicable accounting procedures, the committee sees no need for the Commission to establish a separate system of accounting to determine operating expenses and capital costs attributable to poles, or to reexamine on its own initiative, the reasonableness of the cost methodology made by the utilities and sanctioned by State or local regulatory agencies."

S. Rep. No. 95-580, *supra,* at 20. By failing to heed the wishes of Congress, Complainant's method would create for Respondent's cable customers a system of tax accounting entirely different from that which applies to Respondent's other customers. There is no rational basis for this dual system of accounting, which would favor cable companies one year and disfavor them the next.

28. As paragraph 17 of the Noble Affidavit demonstrates, Complainant's methodology, in contrast to the FPSC methodology, is internally inconsistent and violative of basic utility ratemaking principles.

29. In *Teleprompter of Fairmont,* 79 F.C.C.2d at 241, the Commission calculated total plant administrative expenses as a percentage of net plant investment and as-

sumed that net pole investment carried the same percentage of administrative expenses. While the complaint, Exhibit D page 2, purports to use total administrative expenses as a numerator, it in fact includes only selected administrative accounts. Calculation of administrative expenses according to the *Teleprompter of Fairmont* method results in an administrative expenses rate of 1.87% rather than the complaint's 0.72%.

30. In selecting only a portion of all plant administrative expenses, the Complainant has omitted a host of administrative expense accounts which relate to poles and should be borne by Complainant just as they are by all other customers. Complainant proceeds to divide its inequitably and erroneously reduced administrative expenses total by total plant investment. It would have been more appropriate to use only that portion of total plant investment corresponding to the administrative expense accounts selected. Here, paradoxically, Complainant departs from its practice of arbitrarily picking and choosing administrative accounts. *See* Noble Affidavit Paragraphs 12-14. The *Teleprompter of Fairmont* approach avoids precisely those pitfalls of data misuse into which Complainant has fallen.

31. For the cost of capital component, the complaint uses the 9.31% return on total capital employed value submitted by Respondent and accepted by the Bureau in *Teleprompter Corp.* v. *Florida Power Corp.*, PA-81-0008 (Released July 16, 1981). In *Teleprompter Corp.* v. *Florida Public Utilities Co.*, 49 R.R.2d 1051, 1052 (1981), the Bureau adopted Florida Public's return on equity authorized by the FPSC, 13.25%, as the cost of capital component in computing the maximum annual pole attachment rental rate. The Bureau thereby rejected a return on total capital employed value supplied by Florida Public in response to Teleprompter's request for information and propounded by Teleprompter as the proper cost of capital value. Complaint at 5, Exhibit B. In *Florida Power and Light*, No. PA-81-0017 (Released July 14, 1981), the Bureau again

rejected a total capital employed value advocated by the complainant cable company in favor of the return on equity—in this case 14%—authorized by the FPSC. Because it was filed months before the Bureau's clarification of the preferred methodology for deriving the cost of capital component, Respondent's submission referred to by Complainant did not advocate the use of the authorized return on equity value. In keeping with the preponderance of recent Bureau decisions, Respondent urges the use of the return on equity value authorized by the FPSC, 14.6%, in the instant case.

32. Complainant adjusts net pole investment by subtracting 15%, representing an estimate of the investment in items not essential to CATV attachments. Respondent finds the subtraction of investment in items not essential to CATV attachments arbitrary and unreasonable. Net pole investment, without subtractions, should be the base figure from which the cable attachment rental rate is derived. Indeed, 47 U.S.C. § 224(d)(1) speaks of costs "attributable to the entire pole," not to the "bare pole." Respondent for the purposes of this calculation deducts 15% from net pole investment in accordance with the Commission determination in *Teleprompter of Fairmont, Inc.* v. *Chesapeake and Potomac Company of West Virginia*, 47 R.R.2d 1407, 1410 (1980), but in no way accepts the validity of this approach.

33. The complaint uses 13.5 feet as the average usable space figure and one foot as the space occupied by CATV. Respondent respectfully submits that in defining "usable space" to include safety spaces between users while allowing attribution of no more than one foot of usable space to CATV users, the Commission has misconstrued Congressional intent and dictated the calculation of pole attachment rates which are neither just nor reasonable. As paragraph 24 of the Affidavit shows, if Complainant owned its own pole system it would incur considerably higher annual costs than it now pays Respondent. Where

more equitable allocation of "usable space" to CATV would result in a finding that Respondent's current rates are just and reasonable, the Commission's interpretation results in the finding that a rate which already provides Complainant a bargain must be drastically reduced. This reduction would come at the expense of utility users. Through its "usable space" decisions, then, the Commission has brushed aside significant countervailing public interests in a single-minded effort to grant CATV companies every conceivable advantage. Respondent therefore urges the Commission to revise its "usable space" policies so that calculations according to the Commission's formula will yield rental rates which are just and reasonable. In the instant dispute, $16.94 is such a rate.

34. If a use ratio of 7.41% is employed to complete a calculation of the rental rate consistent with all of the Commission's interpretations, the resulting annual rental rate per pole is $2.67, as compared to the $1.79 requested by the complaint.

35. An annual rate of $16.94 per pole would be a just and reasonable charge for Complainant's use of Respondent's poles. Respondent has developed this rate by positing the existence of an already-constructed pole system owned by Complainant and multiplying conservative estimates of the net investment per pole and carrying costs that system would require. *See* Affidavit paragraph 24. That Complainant now pays a far lower rate under the terms of the agreement reached with Respondent illustrates the justice of the contractual rate and the injustice of Complainant's request for Commission imposition of a still lower rate. It is only fair and just for Respondent's utility customers to share in the savings Complainant derives from using Respondent's pole system rather than maintaining its own.

IV. Procedural and Remedial Requests

36. Respondent requests authority to conduct limited discovery designed to illuminate the likely effects of the

several remedies requested by Complainant. If the Commission determines that Respondent's rates, terms, or conditions are not just and reasonable, Section 1.1410 of the Commission's Rules does not mandate any specific remedy, but rather allows a variety of remedies. The Commission has made liberal use of these remedies in the pole attachment complaints it has decided. *See, e.g., Teleprompter of Fairmont, supra.* Respondent submits that the decision to "[o]rder a refund, or payment, if appropriate," §1.1410(c), for example, should rest on a determination that a furtherance of the Congressional aims underlying Section 224 will result. In adopting 47 U.S.C. § 224, Congress hoped "to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 95-580, 95th Cong. 1st Sess. 14 (1977). It is fully possible that some or all of the remedies the Commission could order would serve only to transfer income from the Respondent's utility users to the Complainant without any beneficial effects on cable television service. Respondent hopes to learn more about the role of pole attachment costs in Complainant's business by inspecting records required by Section 76.305 of the Commission's Rules to be available for public inspection. Nonetheless, only discovery will enable Respondent and the Commission to guage [*sic*] accurately the likely public benefits, if any, of the remedies sought by Complainant.

37. If the Commission should decide to modify the rental rates provided for in the contract, then Respondent requests that the Commission serve a copy of any final action in this case upon each local body regulating Complainant's cable activities within the geographical area specified in the complaint. The Commission might thereby increase the possibility that any increased revenue received by Complainant would not merely be profit for Complainant, but might also be passed on to Complainant's customers.

38. As the complaint, paragraph 9, and the Affidavit, paragraph 26, make clear, Complainant has been in violation of the parties' pole attachment agreement for the past two years. Rather than paying a rate calculated according to the terms of the contract, Respondent simply has decided to pay what it wishes. As a result, Complainant now owes Respondent a sum of over $40,000. Should the Commission decide to set a new rate, Respondent submits that any relief ordered should be formulated with this outstanding debt in mind. Under these circumstances, the ordering of a refund, or even the ordering of a new rate, without provision for repayment of the debt would be inequitable.

Respectfully submitted,

FLORIDA POWER CORPORATION

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December 2, 1981

EXHIBIT A

LEGAL MEMORANDUM

I. The Relief Requested Would Abrogate a Contract Existing Prior to the Pole Attachment Act, Thereby Violating the Due Process Clause of the Fifth Amendment of the United States Constitution

While the prohibition of article I of the United States Constitution against laws impairing the obligation of contracts applies on its face only to the states, the due process clause of the fifth amendment "provides essentially the same restraint against federal impairment of the obligation of contracts." *Northwestern National Life Insurance Co.* v. *Jordan*, 447 F. Supp. 856, 859 (D. Nev. 1978). *See Lynch* v. *United States*, 292 U.S. 571, 579 (1934); *Johnson* v. *United States*, 79 F. Supp. 208 (Ct. Cl. 1948); *Miller* v. *Howe Sound Mining Co.*, 77 F. Supp. 540 (E.D. Wash. 1948).

The relief requested suffers from the same defects the Supreme Court found dispositive in ruling a Minnesota statute unconstitutional under the contract clause in its recent landmark decision, *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) (statute subjected to a pension funding charge any private employer of 100 employees or more—at least one of whom was a Minnesota resident—who had established a voluntary pension plan qualified under § 401 of the Internal Revenue Code, if he either terminated the plan or closed his Minnesota plant).

The heart of *Allied Structural Steel*'s analysis lies in an evaluation of the nature and purpose of the contested statute in light of several factors the Court found significant in upholding a state mortgage moratorium law in *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398 (1934): the existence of an emergency, the legislative purpose of protecting a basic societal interest rather than a favored

group, appropriate tailoring of the relief to the emergency, the reasonableness of the imposed conditions, and the legislation's limitation to the duration of the emergency. This evaluation followed an initial consideration of the statute's effects, the Court stating that the severity of contractual impairment determines the care with which the challenged legislation's nature and purpose should be examined. *Allied Structural Steel*, 438 U.S. at 245.

The relief requested would destroy, from the date of the filing of the Complaint, by far the greater part of the value to Respondent of the contractual agreement at issue. Such a severe contractual impairment calls for the kind of careful scrutiny of the Pole Attachment Act, 47 U.S.C. § 224 (Supp. II 1978), as applied, which the Court brought to bear on the pension plan statute in *Allied Structural Steel*.

In *Allied Structural Steel*, the Court noted that the statute "was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early 1930's." *Id.* at 249. Neither, of course, can the level of the cable pole attachment rental rates and the pace of cable television's progress be likened to the Depression. *Allied Structural Steel* further emphasized that the challenged legislation's duties focused narrowly on a class of private employers, and had not been enacted to protect a general social interest. *Id.* at 247-49. The Pole Attachment Act similarly focuses its burdens on one narrow class, utility companies, while bestowing its benefits on another, cable television companies. In breadth and significance, the societal interest protected by the Pole Attachment pales in comparision not only with the interest protected by the statute upheld in *Blaisdell*, but even with the interest protected by the statute ruled unconstitutional in *Allied Structual Steel*.

The *Allied Structural Steel* court cited yet another flaw in the pension plan statute under the *Blaisdell* standard:

the legislation "did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively." *Id.* at 250. So too would the relief requested severely, permanently, and immediately change the benefits Respondent expected to derive from a negotiated contractual agreement.

Turning from *Blaisdell* to *Veix* v. *Sixth Ward Building & Loan Assn.*, 310 U.S. 32 (1940), *Allied Structural Steel* noted another factor relevant to the consideration of legislation under the contract clause, prior governmental involvement in the area of regulation. *Veix* upheld New Jersey regulation of the requirements for the withdrawal of building and loan association certificates, observing that the state had established statutory requirements for withdrawal for nearly thirty years. As *Allied Structural Steel* recognized, *Veix* rested on the principle that when the petitioner "purchased into an enterprise already regulated *in the particular* to which he now objects, he purchased subject to further legislation upon the same topic." 438 U.S. at 242 n.13 (quoting 310 U.S. at 32) (emphasis added). The *Veix* test in no way supports the constitutionality of Commission abrogation of Respondent's pole attachment contract with Complainant. At the time of the contract's formation, the particular topic involved, cable pole attachment rates, had never been regulated. Rather, as in *Allied Structural Steel*, the legislative body intervened in an unprecedented way. That both cable companies and utilities were regulated in other areas of activity does not cure the constitutional defect in the requested relief. *See Garris* v. *Hanover Insurance Co.*, 630 F.2d 1001 (4th Cir. 1980) (abrogation of insurance company—agent contract not justified because outside the traditional scheme of state insurance industry regulation).

By placing constitutional limits on governmental abridgment of existing contractual relationships, the contract

clause protects the vital societal interest in the reliability of such relationships. As the Supreme Court made clear in *Allied Structural Steel*, those limits exclude from the sphere of permissible governmental activity any impairment of contracts which is not motivated by an emergency, is not careully limited in duration and severity to the imperatives of the problem it is designed to meet, injures a narrow group, protects no broad societal interest, and invades a particular area never before subject to regulation. Because the relief requested suffers from all of these defects, it would violate the contract clause as applied through the due process clause of the fifth amendment.

II. The Relief Requested Would Violate the Fifth Amendment of the United States Constitution by Taking Respondent's Property Without Just Compensation and by Depriving Respondent of Property Without Due Process of Law

The relief requested would allow the Respondent to charge Complainant no more than $1.79 annually per pole for the use of Respondent's poles, and thereby would injure Respondent's right to rent space on its property at terms it finds satisfactory. This right constitutes "property" for the purpose of the fifth amendment's injunction against taking of private property for public use without just compensation:

> "The term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership].' . . . It is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess.' "

Pruneyard Shopping Center v. *Robins*, 447 U.S. 74, 82 n.6 (1980).

In determining whether particular injuries to properties are "takings" under the fifth amendment, the Supreme Court has engaged in essentially "ad hoc, factual inquiries", *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978):

> "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' "

Where the particular circumstances of a case support the conclusion that the challenged governmental action either "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land, . . . " *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980), a fifth amendment "taking" has occurred. Under the former test, the government has "taken" property unless its action both responds to the requirements of a substantial public interest and employs means reasonably necessary to the advancement of that interest. *Penn Central*, 438 U.S. at 127 ("a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose"); *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594-95 (1962) (" 'To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the pur-

pose, and not unduly oppressive upon individuals' "); *Chatham* v. *Jackson*, 613 F.2d 73, 78 (5th Cir. 1980) ("First, the public's interest must require the regulation. Second, the means must be reasonably necessary to accomplish the goal and not 'unduly oppressive' to individuals."). In *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), for example, the Supreme Court struck down the application of a zoning ordinance to the plaintiff's property as not bearing a substantial relation to the public health, safety, morals, or general welfare.

In reporting the Pole Attachment Act, the U.S. Senate Committee on Commerce, Science, and Transportation cited two purposes: "To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television services to the public." S. Rep. No. 95-580, 95th Cong., 1st Sess. 14 (1977). The relief requested would substantially advance neither the above two purposes nor, indeed, any purpose required by the public interest.

The rates Respondent charges Complainant are fair, just and reasonable. As Paragraph 35 of the Response and Paragraphs 14-15 of the Noble Affidavit show, if the Complainant owned its own already-constructed pole system, the annual cost of upkeep would be $16.94 per pole. The rate Respondent charges Complainant is $5.47 less than the cost the Complainant would incur from the carrying charges of its own system. The rate Respondent has offered Complainant is $1.61 less than the cost Complainant would incur if it shared the carrying charges of its own system with another party.

The relief requested nonetheless would prohibit the current rate, the proposed rate, and all others exceeding 7.41%—a figure derived from the arbitrary assignment of only one foot of pole space to cable use—of Respondent's

costs as unfair and unreasonable. If the public interest requires such intervention, it also must require similar governmental regulation of all other sales and rentals of private property. The existing regulation of rates Respondent charges for the provision of electrical service cannot explain why Complainant—unlike other buyers and renters—requires federal assurance of rock bottom prices at the expense of a private party's property rights. Like the rates Respondent charges in its employee cafeteria, or the rates a wholly unregulated company charges for its services, pole space rental rates have always rested in the property owner's discretion. Constitutional removal of pole attachment rates from Respondent's control requires more than a finding that existing rates, while affording Complainant a bargain, do not afford Complainant all the advantages Respondent's electrical power consumers derive from traditional utility regulations.[1]

The relief requested, then, cannot advance the purpose of preventing unfair pole attachment practices because Respondent's current practices are fair, just, and reasonable. For the same reason, the relief requested cannot advance the purpose of minimizing the effect of unjust pole attachment practices on the development of cable television services. The proposed means for achieving this second purpose suffers from an additional defect: there are no grounds for believing that the transfer of funds requested would spur cable television service. No evidence has been introduced to show that the continuation of Com-

[1] Like the argument based on existing regulation of Respondent's electric rates, arguments based on evidence recorded in the Pole Attachment Act's legislative history fail to explain why the public interest requires giving Complainant, in contrast to other private buyers and renters, the use of private poles at rock bottom prices. The Senate Committee noted evidence that utilities are in a position to extract unreasonably high rates and that the practices of telephone companies present the danger of competitive restraint, S. Rep. No. 95-580, 95th Cong., 1st Sess. 13 (1977), but Respondent does not extract unreasonably high rates and is not a telephone company.

plainant's local cable service depends on the level of pole attachment rates. Indeed, Complainant apparently has operated successfully to date despite—or, more accurately with the aid of—the contractual rates. Similarly, no evidence has been introduced to show that Complainant would use the additional funds to expand cable operations in Florida or elsewhere. Complainant well might distribute these funds as profit, or invest them in enterprises entirely unrelated to cable.

Only one predictable effect will emerge from the mandating of a new rate: an increase in Complainant's funds. Quite apart from the injustice of requiring Respondent to subsidize the growth of cable television, then, the relief requested might aid Complainant without in any way aiding cable or the public interest. This tenuous connection between means and ends in the Pole Attachment Act sharply contrasts with the more carefully tailored governmental actions considered and upheld in previous "takings" cases. *See, e.g., Andrus* v. *Allard*, 444 U.S. 51 (1979) (Eagle Protection Act forbids commerce in eagles after effective date); *Penn Central* (program to preserve historical landmarks restricts development of privately-owned historical landmarks).

The relief requested, in sum, does not serve any public interest, much less substantially advance a purpose required by the public interest. The taking clause of the fifth amendment will not countenance an uncompensated taking serving only to enrich one private party at another's expense.

The defects inhering in the relief requested, as discussed above, in addition violate the fifth amendment by depriving Respondent of property without due process of law. *See generally Pruneyard*, 447 U.S. at 84-85; *Weaver* v. *Palmer Brothers Co.*, 270 U.S. 402 (1926).

III. The Relief Requested Would Abrogate a Pre-existing Contract and thereby Exceed the Scope of Jurisdiction Authorized by the Pole Attachment Act

Neither the Pole Attachment Act nor its legislative history indicate Congressional intent to grant the Commission authority to abrogate contracts in existence prior to the Act's effective date. Respondent respectfully submits that the failure of the Commission, in asserting such authority, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585, 1590-91 (1978), 72 F.C.C.2d 59, 67 (1979), and the D.C. Circuit, in affirming it, *Monongahela Power Co.* v. *FCC*, No. 80-1390, slip op at 607 (D.C. Cir., May 15, 1981) to cite any clear supporting language demonstrates the weakness of the case for Commission jurisdiction. Aside from essentially irrelevant passages in the act and its legislative history, *Pole Attachments* and *Monongahela* forward only the argument that without authority to abrogate existing contracts, the Commission would be powerless to act on its mandate. To the contrary, however, there are many pole attachment agreements which postdate the Pole Attachment Act.

Without evidence of Congressional intent to grant the Commission authority to abrogate existing contracts, such intent cannot be read into the Pole Attachment Act without violating an established principle of statutory construction which allows only prospective application of legislation absent a clear legislative statement to the contrary:

> "[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the unequivocal and inflexible import of the terms and the manifest intention of the legislature."

Greene v. *United States*, 367 U.S. 149, 160 (1964). Those cases narrowly construing even clear Congressional grants

of such authority to administrative agencies further contravene the findings of Congressional intent to authorize abrogation of existing pole attachment contracts in the absence of supporting evidence. *See generally Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

In light of the absence of evidence of Congressional intent to authorize the Commission to abrogate existing contracts, and the rules of statutory construction forbidding Commission exercise of such authority without unequivocal supporting evidence, the relief requested would fall outside of the Commission jurisdiction created by the Pole Attachment Act.

Respectfully submitted,
FLORIDA POWER CORPORATION

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Exhibit B

STATE OF FLORIDA)
COUNTY OF PINELLAS)

FILE NO. PA-82-0005

AFFIDAVIT OF MATTHEW R. NOBLE

BEFORE ME, the undersigned authority, on this day personally appeared Matthew R. Noble, who, after being sworn, deposes and says:

1. My name is Matthew R. Noble. My business address is 3201 34th Street South, St. Petersburg, Florida. I am the Manager for Liason and Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Florida Power").

2. I hold a Bachelor's degree in Engineering Technology from the University of South Florida, Tampa, Florida, and an Associate of Science degree in Electronics from St. Petersburg Junior College, St. Petersburg, Florida. I have been employed by Florida Power for the past eight years. My experience in that time has included one year in the area of system planning, four years in the area of scheduling and coordination, and three years in the Real Estate Department. As Manager for Joint Use Affairs, I am responsible for developing appropriate pole attachment charges and negotiating the terms of pole attachment contracts.

3. I have read and am familiar with (a) Sections 1.1401 through 1.1415 of the Rules and Regulations of the Federal Communications Commission, and (b) the Complaint filed by Cox Cablevision Corp. d/b/a Highlands Cable TV ("Cox")

against Florida Power, File No. PA-81-____. In accordance with Section 1.1407(a), I am making this affidavit for filing as a part of the Response of Florida Power to such complaint.

4. I have also read the Response of which this affidavit is a part, and I am familiar with the matters contained therein insofar as the Response concerns the rates, terms and conditions of pole attachment agreements to which Florida Power is a party. The facts set forth in such Response and in this affidavit are true and correct to the best of my knowledge and belief.

5. I have obtained all of the data relating to Florida Power operations in this affidavit from the Florida Power Economic Research Group. This data accurately reflects Florida Power's carrying charges as of December 31, 1980. In light of the filing date of this complaint, the December 31, 1981 data will more accurately reflect the current carrying charges. This December 31, 1981 data will be compiled, calculated and submitted as an amendment to this affidavit.

6. I have calculated two annual pole attachment rates. The first, determined in accordance with relevant Commission *Reports and Orders* and *Memorandum Opinions and Orders*, is $2.67. The second, determined in accordance with the Florida Power conception of a fair and just rate, is $16.94. Paragraphs 7-20 and 23-25 below explain the derivation of the second rate.

7. As of December 31, 1980, Florida Power gross pole investment was $88,975,480, and pole depreciation reserve was $29,327,582. The first figure appeared under account 364 on Florida Power's Annual Report for 1980 to the Federal Energy Regulatory Commission ("FERC Form 1"). Net pole investment, expressed as gross pole investment less pole depreciation reserve, equalled $59,647,898. Subtraction of 15% of net pole investment to account for

investment not essential to CATV results in net bare pole investment of $50,700,713.

8. Florida Power owned 528,655 poles as of December 31, 1981. Net investment per bare pole, expressed as the quotient of net bare pole investment divided by the number of poles owned by the Florida Power Corporation, was $95.91.

$$\frac{\text{Net Bare Pole Investment}}{\text{Number of Poles}} = \$95.91 = \text{Net Investment per bare pole}$$

9. The carrying charge is composed of the cost of capital, maintenance expenses, administrative expenses, depreciation, Federal and state income taxes, and other taxes. All components are reported as of December 31, 1980. All carrying charges are expressed as a percentage of net pole investment. Net pole investment percentages are calculated by multiplying gross pole investment percentages by 1.4917, the ratio of gross pole investment to net pole investment.

$$\frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = 1.4917$$

10. The return on equity authorized by the Florida Public Service Commission as of December 31, 1980 was 14.6%.

11. The maintenance expenses component equals the FERC 593 account divided by the corresponding gross pole investment in the FERC 364, 365 and 369 accounts and multiplied by the gross pole/net pole investment conversion ratio.[1] These FERC accounts appear on FERC Form 1 for 1980.

$$\frac{\text{FERC 593 account}}{\text{FERC 364, 365, and 369 accounts}} = \frac{\$\ 10{,}581{,}432}{\$235{,}937{,}450} = 4.48\% = \text{Maintenance expense rate for gross investment}$$

$$4.48\% \times 1.4917 = 6.69\% = \text{Maintenance expense rate for net investment}$$

[1] This formula conforms to the Common Carrier Bureau's methodology in Teleprompter v. Florida Power Corp., PA-81-0008 (Released July 16, 1981).

12. The Complaint calculates administrative expenses by including only selected accounts. Accounts 924-932—which include outside services employed, property insurance, workmen's compensation, and employee pensions—all relate to pole attachments, yet the Complaint appears to include only accounts 920-923. Fringe benefit costs above salary expenses, and the system liability insurance all poles require, to choose two examples of improperly omitted costs, are essential costs of doing business benefitting all users. If Florida Power did not pay such costs, it could not provide the pole systems that are utilized by the cable companies. Florida Power's other customers absorb all of the administrative costs on their portions of the pole. There is no reason why cable companies should receive preferential treatment.

13. Proceeding on the erroneous assumption that only the administrative expenses in the Complaint relate to poles, the next step logically would be to divide the resulting administrative expenses figure by a plant investment figure correspondingly lessened by the exclusion of categories of investment unrelated to poles. But no such balancing is possible, since the expense accounts the Complaint selects do not relate to any particular part of plant.

14. An administrative expense value including all expenses related to poles, 1.87%, should be used:

$$\frac{\text{Total administrative expenses}}{\text{Gross plant investment}} = \frac{\$29,943,156}{\$2,078,396,138}$$

= Administrative expense rate for gross investment

1.44% x 1.297 = 1.87% = Administrative expense rate for net investment

15. The depreciation rate is calculated for straightline depreciation as the quotient of 1 minus salvage value divided by the average life of 22 years authorized by FERC account 364 by the Florida Public Service Commission.

$$\frac{1 - \text{salvage value}}{22} = \text{Depreciation rate for gross investment}$$

$$\frac{1 - 0}{22} = 4.55\%$$

4.55% x Ratio = Depreciation rate for net investment

4.55% x 1.4917 = 6.79%

16. The federal and state income tax component equals the income tax paid on the equity portion of the return on investment. The income tax includes the levelized effect of both current and deferred taxes as required under full normalization accounting. The calculation of income taxes below is consistent with the Florida Public Service Commission method and uses standard levelized fixed charge rate equations for income tax.

Federal and state income tax rate = .487

Debt/equity ratio - .4703

Composite cost of debt = 8.79

Composite cost of capital = 9.31

A/P = capital recovery

Average life = 22

Depreciation rate for gross investment = 4.55%

$$\text{Income Tax} = \frac{(487)}{(1 - .487)}\left(1 - \frac{(.4703)\,(8.79)}{9.31}\right)\left(\frac{(\text{A/P, } 9.31\%\text{, } 22\text{ yrs.})}{-.0455}\right)$$

Income Tax = 3.32% = Income tax rate for gross investment

3.32% x 1.4917 = 4.95% = Income tax rate for net investment

17. The Complaint's use of current taxes paid to develop the tax component of carrying charges is both self-contradictory and contrary to sound utility rate making principles.[2] In 1980, Florida Power recorded -\$27 million in federal income taxes. A utility incurs negative income taxes only when it loses money in an accounting sense. By relying on negative income taxes to calculate the tax portion of the carrying charge rate, the Complaint assumes that the pole will have a negative rate of return, *i.e.*, will lose money based on the revenues provided by the Florida Public Service Commission. This assumption conflicts both with the Complaint's acceptance of a positive rate of return in computing carrying charges and with the basic concept of utility regulation. The utility concept accepts an obligation to provide a "fair" rate of return after Federal and State income taxes. The federal government must receive its portion of the fair return—a positive dollar amount—in taxes. Those taxes are borne as a rate payer expense. If there are no taxes owed on the investment return, it is only because there was no return on the investment. If the return is negative, then the utility eventually fails, or some other entity must subsidize the negative return.

18. Florida Power's federal taxes taken from year-end operating reports in the recent past have varied substantially from year to year:

1980	(-\$ 26,867,971)
1979	\$ 21,650,417

[2] While this discussion focuses on federal taxes, it applies with equal force to state taxes.

1978	$ 48,102,838
1977	$ 34,275,762
1976	(-$ 7,334,472)
1975	$ 8,144,000

Had the complaint substituted 1978 federal taxes in its calculation, the tax component nearly would have qradrupled. Such reliance on taxes *at any one point in time* does not comport with the long term goal of rate making. The tax component should reflect the amount of federal and state taxes *that will be paid on the granted return portion of the fixed charge rate.* If a utility is granted a positive return on an investment, then it will have positive earnings from that investment which will result in a *positive* federal income tax. The methodology employed by Florida Power and approved by the Florida Public Service Commission follows this proper and widely accepted utility rate making philosophy.

19. The calculation of "other" taxes for net investment begins with the "other" tax total, comprised largely of property taxes and gross receipts taxes, which was reported on account 408.10 of the FERC Form 1 for 1980. That figure, less franchise fees, is then divided by the gross plant investment figure which was reported on the same FERC Form and multiplied by the more specific gross pole/net pole investment conversion ratio.

Other taxes (except for franchise fees)

Gross Plant Investment = $\frac{\$36,940,257}{\$2,078,396,138}$ = 1.78% = Other rate for gross investment

78% x 1.4917 = 2.65% = Other tax rate for net investment

20. Total carrying charges, 37.55%, equal the sum of the individual components derived above in paragraphs 10-19:

	% of Net Pole Cost
Return (Cost of Capital)	14.6
Maintenance Expense	6.69
Administrative Expenses	1.87
Depreciation	6.79
Federal & State Income Taxes	4.95
Other Taxes	2.65
Total	37.55

21. The annual revenue requirement per pole is derived by multiplying the net investment per pole figure in paragraph 8 by the carrying charges percentage in paragraph 20.

$95.91 x 37.55% = $36.01 = Annual revenue requirement per pole

22. If the annual revenue requirement per pole were to be multiplied by 7.41%, the annual pole attachment rental rate would be $2.67.

23. The present pole attachment rate, $11.47, was instituted by Florida Power pursuant to that section (8.1) of the contract between the parties which governs rates when the parties fail to agree on a rate revision. Both that rate, and the rate of $6.86 offered to Cox by Florida Power during negotiations, are fair and just. They are much lower than the annual pole cost Cox would incur if it owned its own already-constructed pole system.

24. An annual rental rate of $16.94 per pole would be fair and just. It is reasonable to assume that a cable company-owned pole system would resemble closely a telephone-owned pole system, since both only require poles of minimal height. *Teleprompter Corporation* v. *General Tele-*

phone Company of Florida, No. PA-81-0021 (Released July 8 1981), found a General Telephone Company of Florida net investment per pole of \$45.12. The carrying costs for telephone pole systems generally exceed those for the Florida Power system. Accordingly, a conservative estimate of the carrying cost percentage for a cable company-owned system equals the figure derived for Florida Power herein. Multiplying net investment per pole by carrying costs yields an annual pole cost for a cable company-owned system of \$16.94.

\$45.12 x 37.55% = \$16.94

25. If Cox were to share equally the costs of its pole system with another user, the annual cost for each party would be \$8.47, still well above the rate Florida Power has offered to Cox. Florida Power, far from abusing its bargaining power, charges Cox much less than Cox would pay annually for its own system.

26. Since 1979, Cox has failed to pay Florida Power according to the terms of the parties' contractual agreement. As a result of this contractual violation, Cox now owes Florida Power \$40,738.73, not including interest.

27. All CATV rental payments are deposited in a general fund which helps to reduce the overall rate base paid by the utility customer. To require Florida Power to lower its pole rental rates, therefore, would increase the already substantial savings to CATV companies at the expense of utility customers.

Signed this 30th day of November, 1981.

/s/ Matthew R. Noble
Matthew R. Noble

Sworn to and subscribed before
me this 30th day of November, 1981.

/s/ Paul R. Morin
Notary Public

My Commission Expires:
November 25, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 1981, copies of the foregoing "Response" have been mailed, postage prepaid to:

Charles H. Helein
Dow, Lohnes & Albertson
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for Complainant

Florida Public Service Commission
Commission Clerk
101 East Gaines Street
Tallahassee, Florida 32301

Federal Energy Regulatory Commission
825 North Capitol Street, N.W.
Washington, D.C. 20426

/s/ Michael S. Bernstein
Michael S. Bernstein

December 2, 1981

Nos. 85-1658 and 85-1660

In the Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, APPELLANTS

v.

FLORIDA POWER CORPORATION, ET AL.

GROUP W CABLE, INC., ET AL., APPELLANTS

v.

FLORIDA POWER CORPORATION, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL APPELLANTS

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QUESTIONS PRESENTED

1. Whether the Pole Attachments Act of 1978, 47 U.S.C. 224, which regulates the rates that cable television operators can be charged by those who have permitted the attachment of the cable operators' wires to their utility poles, effects a taking under the Fifth Amendment.

2. Whether, if so, the Act violates the Fifth Amendment because it empowers an administrative agency to calculate just compensation for a taking.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following parties participated in the proceeding before the Eleventh Circuit: National Cable Television Association Inc., Cox Cablevision Corporation, Tampa Electric Company, Mississippi Power & Light Company, Alabama Power Company, Arizona Public Service Company, and Acton Corporation.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1658

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, APPELLANTS

v.

FLORIDA POWER CORPORATION, ET AL.

No. 85-1660

GROUP W CABLE, INC., ET AL., APPELLANTS

v.

FLORIDA POWER CORPORATION, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL APPELLANTS

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-20a)[1] is reported at 772 F.2d 1537. The memorandum opinions and orders of the Federal Communica-

[1] "J.S. App." references are to the appendix to the jurisdictional statement in No. 85-1658.

tions Commission and its Common Carrier Bureau (J.S. App. 21a-28a, 29a-35a, 36a-47a) are unreported.

JURISDICTION

The judgment of the court of appeals (J.S. App. 48a-49a) was entered on October 8, 1985, and rehearing was denied on November 12, 1985 (J.S. App. 50a-51a). A notice of appeal was filed on December 10, 1985 (J.S. App. 52a-53a). On January 31, 1986, Justice Powell extended the time for docketing an appeal to and including March 10, 1986, and on March 3, 1986, he further extended that time to and including April 9, 1986, and the jurisdictional statements were filed on that date. Probable jurisdiction was noted and the cases were consolidated on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part: "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The text of the Pole Attachments Act, 47 U.S.C. 224, is set forth at J.S. App. 54a-56a.

STATEMENT

1. Cable television service requires the transmission of video programming from a central location to subscribers' television sets through the use of coaxial cables and other transmission equipment. Financial, environmental, and local franchise constraints typically require cable companies to utilize space available

on existing poles of telephone or electric power companies to string their cables (S. Rep. 95-580, 95th Cong., 1st Sess. 12-14 (1977)). Accordingly, cable companies historically have entered into leasing agreements with utilities for the rental of space on their poles for a periodic fee.[2] Conflicts arose, however, over the fees charged; the cable operators contended that the utilities exploited their superior bargaining position—resulting from the ownership of the poles and the operators' lack of any alternative placement options—to demand exorbitantly high fees (*id.* at 13).

Since the states had generally not asserted regulatory authority over the pole attachment policies of the utilities (S. Rep. 95-580, *supra*, at 14), the cable operators sought relief from the Federal Communications Commission. The Commission, however, decided (in *California Water & Telephone Co.*, 40 Rad. Reg. 2d (P & F) 419 (1977)) that it lacked authority under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, over pole attachment rates.

In 1978, Congress concluded that "the Federal Communications Commission should fill [this] regulatory vacuum to assure that rates, terms and conditions otherwise free of governmental scrutiny are assessed on a just and reasonable basis" (S. Rep. 95-580, *supra*, at 17). Congress accordingly enacted the Pole Attachments Act, 47 U.S.C. 224, to "creat[e] within the FCC an administrative forum for

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[2] Although most cable television cables are strung above ground on utility poles, about 5% are placed underground in ducts, conduits, or trenches, which are also owned by telephone and electric power companies that permit the cable television companies to use available space (S. Rep. 95-580, *supra*, at 12).

the resolution of CATV pole attachments disputes and [to] prompt[] the several states * * * to develop their own plans free of Federal prescriptions" (S. Rep. 95-580, *supra*, at 14).

The Pole Attachments Act directs the FCC to "regulate the rates * * * for pole attachments to provide that such rates * * * are just and reasonable" (47 U.S.C. 224(b)), unless the state regulates such matters and provides the Commission with an appropriate certification to that effect (47 U.S.C. 224(c)).[3] The statute defines a "just and reasonable rate" as one which provides for the recovery of not less than the additional costs of providing the attachments (the incremental costs) or more than the proportional share of the capital and operating expenses of the pole (the fully allocated costs). 47 U.S.C. 224(d)(1). See S. Rep. 95-580, *supra*, at 19-21.[4]

The legislative history of the Act emphasizes (S. Rep. 95-580, *supra*, at 16-18) that "the matter of CATV pole attachments [is] essentially local in nature, and that the various state and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV

[3] The term "pole attachment" is defined to include "any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility" (47 U.S.C. 224(a)(4)). See note 2, *supra*. Because the complaints to date have related to above-ground pole attachments, this brief refers only to such poles. The same principles would, however, apply to shared space in ducts, conduits, or rights-of-way. See note 18, *infra*.

[4] The statute originally limited the effectiveness of the statutory formula to five years (47 U.S.C. (Supp. II 1978) 224(e)). That limitation was deleted in 1982 (Communications Amendments Act of 1982, Pub. L. No. 97-259, § 106, 96 Stat. 1091).

pole attachments" (*id.* at 16). The Commission's jurisdiction was not only to be temporary, until a state acted (*id.* at 28), but also to be limited—it exists only when the utility has voluntarily agreed to permit the CATV pole attachment (*id.* at 15-16),[5] and even then only when "the parties themselves are unable to reach a mutually satisfactory arrangement" (*id.* at 15). Thus, the Commission was not given general rate-making authority in this area (*ibid.*).

2. This case arose out of three contracts entered into by appellee Florida Power Corporation for the leasing of excess space on its poles to cable television companies. Florida Power agreed to permit cable attachments only on poles where, in its judgment, the CATV use "will not interfere with its own service requirements" (J.A. 18, 104, 133, 213): Florida Power also retains the right to reclaim the space whenever it is needed for its own purposes, leaving the CATV company only the option of financing the entire expense of substituting new, taller poles if it wishes to continue its attachment (J.A. 20-21, 106-107, 135-136, 215-216).[6] The contracts were made in 1963 (with Cox Cablevision Corporation), 1977 (with

[5] The Senate committee noted that "access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of a plant" (S. Rep. 95-580, *supra*, at 16). The committee did state, however, that it believed that the Commission could determine that any effort by a utility to discontinue providing pole attachment space solely in order to avoid FCC jurisdiction was an unjust or unreasonable practice, and that the Commission could "take appropriate action upon [such] a finding" (*ibid.*).

[6] The contracts provide that the cable operators' use of the space shall not "create or vest in the [operator] any ownership or property right in said poles" (J.A. 31, 118, 147, 224).

Teleprompter Corporation)[7] and 1980 (with Acton CATV Inc.), and provided for annual pole rates ranging from \$5.50 in 1963 to \$7.15 in 1980 (J.S. App. 3a, 5a-7a).[8]

Teleprompter filed a complaint with the FCC on November 18, 1980, pursuant to the Pole Attachments Act, alleging that the contract rates of \$6.51 per pole for 1981 and \$6.79 for 1982 were unfair. Acton filed a similar complaint on February 20, 1981, challenging its \$7.15 per pole contract rate (J.S. App. 5a-6a). On July 16, 1981, the Commission found that, in each case, an annual per pole rate of \$1.79 was the maximum rate that was just and reasonable (*id.* at 7a, 44a). While this decision was pending on agency review, Cox filed its complaint; on March 8, 1982, the Commission applied to Cox its conclusion that \$1.79 per pole was the maximum just and reasonable rate for Florida Power's poles (*id.* at 7a, 33a). The applications for review were denied by the agency on September 28, 1984 (*id.* at 8a, 21a-28a).

3. Appellee Florida Power petitioned for review of the final Commission order, pursuant to 47 U.S.C. 402(a).[9] It alleged that the Commission's order amounted to a taking of its property without just

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[7] Appellant Group W Cable, Inc., is the successor in interest to Teleprompter (J.S. App. 8a).

[8] The contract rate provisions are summarized at J.S. App. 30a n.1, 38a n.2.

[9] Section 402 (47 U.S.C.) provides, by reference to Chapter 158 of Title 28, for Administrative Procedure Act review of agency decisions of this kind in the court of appeals where the petitioner resides or in the United States Court of Appeals for the District of Columbia Circuit (28 U.S.C. 2342(1), 2343). Florida Power, which resides in the Eleventh Circuit, filed the petition there.

compensation, and asked the court of appeals to set aside that order and remand the case for the Commission "to provide constitutionally just compensation" (FPC C.A. Br. 54).

The court of appeals concluded that *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), compelled the conclusion that the presence of cable TV wires on Florida Power's poles constituted a permanent physical invasion, and thus a taking of Florida Power property under the Fifth Amendment (J.S. App. 14a). The court did not, however, reach Florida Power's claim that the rate prescribed by the Commission was constitutionally inadequate. It decided instead that the determination of just compensation is "solely within the parameters of the judicial function" (*id.* at 15a), and may not constitutionally be delegated at any stage to a nonjudicial agency. The court accordingly held that the Pole Attachments Act is unconstitutional because it "does not [properly] allow for a judicial determination of just compensation" and instead permits that determination to be "made by an administrative agency at the behest of Congress" (*id.* at 19a).

SUMMARY OF ARGUMENT

Rate regulation does not implicate the Just Compensation Clause, so long as the rates imposed are not confiscatory. The Pole Attachments Act exemplifies such permissible regulation. It was enacted to provide a federal forum for the resolution of disputes arising out of voluntarily made pole attachment agreements in the absence of a state's assertion of jurisdiction over such agreements. The exercise of this traditional regulatory jurisdiction is not subject to Just Compensation Clause analysis. *Loretto* v. *Teleprompter*

Manhattan CATV Corp., supra, is not to the contrary. In contrast to the statute at issue in *Loretto,* the Pole Attachments Act gives no cable operator any right to attach equipment to the property of another, or to remain in any space the utility needs for its own purposes. Thus, the regulatory controls at issue here are far more analogous to the rent controls distinguished in *Loretto* and in *Fresh Pond Shopping Center, Inc.* v. *Callahan,* 464 U.S. 875 (1983), than to the *Loretto* situation.

In any event, if the Pole Attachments Act does involve a "taking" subject to the Just Compensation Clause, it provides for constitutionally adequate compensation. There is no constitutional impediment to the statutory requirement that the Commission determine a "just and reasonable" rate (47 U.S.C. 224(b)), even though the statute defines that rate as not exceeding fully allocated costs (47 U.S.C. 224(d)). In the first place, the court of appeals plainly erred in interpreting this Court's precedents as precluding any agency participation in the determination of just compensation, and appellees do not attempt to support that interpretation. Moreover, there is no unconstitutional restriction on judicial review of the agency determination, nor is there any practical impediment to such review.

ARGUMENT

I. THE POLE ATTACHMENTS ACT DOES NOT EFFECT A TAKING OF APPELLEE FLORIDA POWER'S PROPERTY

A. The Statutory Preclusion Of Unjust And Unreasonable Rates Does Not Implicate The Just Compensation Clause

It has long been established that "when private property is devoted to a public use, it is subject to public regulation" (*Munn* v. *Illinois,* 94 U.S. 113, 130 (1876)), and that neither before nor after the adoption of the Fourteenth Amendment was it "supposed that statutes regulating the use, or even the price of the use, of private property, necessarily deprived an owner of this property without due process of law" (*id.* at 125).[10] Instead, so long as it is imposed with procedural propriety and without invidious discrimination, rate "[r]egulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness." *Permian Basin Area Rate Cases,* 390 U.S. 747, 769 (1968). Accord, *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 601 (1944). So long as the rates established are not confiscatory, there is no viable objection based on the Just Compensation Clause. *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 51 (1936); *Permian Basin Area Rate Cases,* 390

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[10] Indeed, the Court in *Munn* v. *Illinois, supra,* traced the acceptance of the propriety of public regulation of the charges for use of private property to "the third year of the reign of William and Mary" (94 U.S. at 129).

U.S. at 769-770. See also *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 603-604 (1942) (Black, Douglas & Murphy, JJ., concurring).

In a manner entirely consistent with these principles, the legislative history of the Pole Attachments Act points out that the regulation of pole attachment rates falls comfortably within traditional state and local regulatory authority (S. Rep. 95-580, *supra*, at 16-17):

> The [Senate] committee considers the matter of CATV pole attachments to be essentially local in nature, and that the various state and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV pole attachments. Regulation should be vested with those persons or agencies most familiar with the local environment within which utilities and cable television systems operate. * * *
>
> [T]he framework for such state and local regulation is already in place. CATV systems and electric power and telephone utilities are subject, in varying degrees, to local or state regulation in numerous ways. State and local public service commissions and other agencies already possess a wealth of experience in regulating intrastate power and telephone companies. CATV systems are granted franchise permits from the officials in the communities in which they operate. Several States have cable television commissions which perform regulatory functions in addition to those performed by the community franchising authorities.

The court below specifically reserved the question of the extent of the power of a "state agency charged with the responsibility of regulating the power company as a public utility" (J.S. App. 20a). But surely such an agency could, under the authorities cited above, establish reasonable rates to be charged by appellees for pole attachments as a part of its general rule-making authority without running afoul of the Just Compensation Clause.[11] The utility's total annual revenue is typically fixed by the state agency to reflect its perceived overall revenue requirements. Funds derived from pole attachment fees help defray costs that would otherwise be borne by the utility's customers. The determination of the proper allocation of costs between different kinds of utility customers is the essence of the business of utility regulatory agencies. In this context, the cable companies are in effect simply another kind of customer, and state regulation of the rates charged them by the utilities would be no less consistent with the Just Compensation Clause than is any other component of the state rate regulation scheme.[12]

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[11] Alternatively, if the regulation of the attachment fees were imposed by a local authority as a condition of permitting the utility to construct its poles on public property in the first instance, there could scarcely be a legitimate "taking" claim.

[12] Appellee Florida Power argues (Mot. to Aff. 15) that in leasing space on its poles it is acting not "in its role as a public utility rendering electric service to the public, but rather in its non-utility role as a renter of space on its property * * *." The suggested distinction is overdrawn and wholly immaterial for purposes of allocating pole costs among the users. As the legislative history points out (S. Rep. 95-580, *supra*, at 18):

> CATV pole attachment ratesetting involves equity considerations. Decisions regarding the allocation of pole costs among users should reflect in some rough sense the ability of cable subscribers and the utilities' customers

Of course, the Pole Attachments Act provides for federal, not state, regulation. But the Just Compensation Clause is not implicated simply because Congress has provided for federal regulation to fill a perceived regulatory gap,[13] and thereby has rounded out the state's scheme of utility rate regulation in a way that the state was free to do itself.[14] In fact, the Commission's authority under the Act is substantially more limited than the authority the state could exercise under the cases cited above. The Commission simply provides a forum for adjudication of claims that contractually established rates are unjust and unreasonable. It has no general rate-making authority; instead, when a dispute is submitted to it for

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to pay for costs which are passed along to them. Another significant equity consideration is the relative importance of each of the respective services to the communities served. Considerations of equity should turn on the needs and interests of local constituents.

In enacting the Pole Attachments Act, Congress thus rejected the notion that the utilities' arrangements with the CATV companies are purely private contracts, unaffected with a public interest. Appellees have offered no reason for overturning this legislative judgment.

[13] Indeed, the Pole Attachments Act expressly provides that the FCC's rate-making authority in this area exists only in the absence of the exercise by the state of such rate-making authority (47 U.S.C. 224(c)(1)).

[14] See *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 322 n.20 (1953) ("This Court has pointed out many times that the exercise of the federal commerce power is not dependent on its maintenance of the economic *status quo*; the Fifth Amendment is no protection against a congressional scheme of business regulation otherwise valid, merely because it disturbs the profitability or methods of the interstate concerns affected.").

resolution, the Commission determines the maximum reasonable rate, by application of the statutory formula to the particular facts of the controversy before it. This exercise of a traditional regulatory adjudicatory function is far removed from actions of the sort that constitute a "taking" subject to the Just Compensation Clause.[15]

B. This Case Is Not Controlled By *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)

The court below did not dispute the above principles—indeed, it did not even address them. Instead, it simply concluded that this case is controlled by *Loretto* v. *Teleprompter Manhattan CATV Corp., supra,* finding that this case, like that, involves an uninvited permanent physical access to the property of another, and thus necessarily a taking for which just compensation is constitutionally required. J.S. App. 8a-14a. We submit that *Loretto* did not overturn the established distinction between the regulation of rates and takings subject to the Just Compensation Clause, even when the rates at issue are for services that involve some physical occupation.[16]

We note at the outset that the petitioner asserting a property interest in *Loretto* was the owner of an

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[15] Moreover, since the Act directs the Commission to establish "just and reasonable" rates, it evidently comprehends the power to raise, as well as lower, rates. Such an enactment is on its face an exercise of the regulatory power, rather than the taking power.

[16] Such physical occupation is not unique to the pole attachment situation. For example, *Munn* v. *Illinois, supra,* establishing the existence of regulatory rate-making authority, involved rates for the physical occupation of the petitioner's grain elevator by the rate-payer's grain.

apartment building, not a regulated utility. Loretto's claim to exclude unwanted intrusions onto her building thus implicated the fundamental concerns of the Just Compensation Clause. These concerns are far more attenuated here, where appellees simply object to the regulation of rates they charge for permitting an additional set of wires to be strung on poles they themselves use for precisely that purpose, and only for that purpose.[17]

Moreover, the Pole Attachments Act, unlike the state law at issue in *Loretto*, gives the cable company no right to attach anything to the property of another. The federal Act applies only in those situations where the utility has agreed to give the cable company access to its property, but a dispute has arisen over the terms of that agreement. The Act simply permits the FCC to resolve that dispute by reviewing the terms of the agreement to assure that they are fair to both parties.[18] While the landlord in

[17] *Loretto* was decided on June 30, 1982. Since that date, several utility companies have challenged the Commission's pole attachment rate orders. See *Alabama Power Co.* v. *FCC*, 773 F.2d 362 (D.C. Cir. 1985) (utility brief filed Feb. 13, 1984); *Duke Power Co.* v. *FCC*, No. 84-2253 (4th Cir.) (utility brief filed Jan. 14, 1985); *Georgia Power Co.* v. *FCC*, No. 84-1107 (D.C. Cir.) (utility brief filed Nov. 5, 1984); *Georgia Power Co.* v. *FCC*, No. 84-1494 (D.C. Cir.) (utility brief filed Dec. 21, 1984); *Georgia Power Co.* v. *FCC*, No. 84-1495 (D.C. Cir.) (utility brief filed Dec. 21, 1984); *Southwestern Electric Power Co.* v. *FCC*, No. 85-1134 (D.C. Cir.) (utility brief filed June 10, 1985); *Texas Power & Light Co.* v. *FCC*, 784 F.2d 1265 (5th Cir. 1986) (utility brief filed Mar. 11, 1985). In none of these seven briefs has the complaining utility suggested that the *Loretto* holding applied in the context of pole attachment regulation.

[18] In 1984, Congress amended the statute to ensure that franchised cable operators would be authorized to use public

Loretto could point to a clear interference with her right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property" (*Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979)), appellees here freely chose to contract away that right with respect to the cables at issue. Their objection is simply to the regulation of the terms of the agreed occupation. They assert the "right" to be free of regulation—a far more attenuated right. See *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 322 n.20 (1953).[19]

rights-of-way and easements. Pub. L. No. 98-549, § 2, 98 Stat. 2786, added 47 U.S.C. (Supp. II) 541(a)(2), which provides that:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—
>
> * * * * *
>
> (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

The precise scope of this new provision is unclear and has not yet been considered by the Commission. The 1984 amendment is, of course, not at issue in this case, in which access was granted as a matter of choice by the utilities.

[19] Compare *Delaware, L. & W.R.R.* v. *Town of Morristown*, 276 U.S. 182 (1928), with *Hilton Washington Corp.* v. *District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985). In *Morristown*, the Court declared an ordinance to be invalid under the Just Compensation Clause because it required a railroad company to set aside a portion of its property for use as a regulated

The court below nevertheless concluded that "the cable companies' occupation of Florida Power's poles at the rate specified by the FCC is anything but invited" (J.S. App. 11a), and refused to attach any significance to the fact that Florida Power had made no efforts to exclude any cable company's wires because such an attempt would allegedly have been futile (*id.* at 11a-12a). Nothing in this record supports the court's speculation that Florida Power's failure to attempt a termination of the agreement was in fact due to a belief that the FCC would not permit it.[20] Indeed, since the CATV wires occupy only surplus space on the poles, termination of the arrangement would be contrary to the economic interest of the utility. Cf. S. Rep. 95-580, *supra*, at 16. It is true that the Committee Report expressed the view that a utility might "conceivabl[y]" wish to discontinue an agreement "simply in order to avoid FCC regulation," and that the Commission might properly find such conduct unjust and unreasonable (*ibid.*). The extent of a utility's power to terminate an agreement

taxicab stand. In *Hilton*, however, regulation of a hotel's taxicab stand was sustained despite a *Loretto*-based attack because there was no governmental compulsion to establish the stand in the first place. Thus, the regulation of the stand, so long as the hotel chose to maintain it, was deemed to be an acceptable restriction on its use rather than a taking of hotel property.

[20] Since FPC never attempted to terminate this agreement, any claim of a taking based on inability to terminate is not ripe for review. *McDonald, Sommers & Frates* v. *Yolo County*, No. 84-2015 (June 25, 1986); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, No. 84-4 (June 28, 1985), slip op. 13-20; cf. *Agins* v. *Tiburon*, 447 U.S. 255, 262-263 (1980).

is unclear under the Act, and the Commission has not attempted to define the limits of that power.[21]

In any event, the court overlooked the fact that at least one of the contracts involved here was first made two years after the enactment of the Pole Attachments Act,[22] and that Florida Power continued to invite the use of its poles by cable companies in

[21] The cases relied upon by the court of appeals (J.S. App. 11a) and the appellees (FPC Mot. to Aff. 10 n.10; Intervenors Mot. to Aff. 12-13) are inapposite. In *Telecommunications, Inc.* v. *South Carolina Electric & Gas Co.*, No. PA-83-0027 (FCC Aug. 16, 1983) (Mimeo 5957), the Commission refused to allow a utility to terminate a pole attachment contract with a cable operator on the grounds of alleged safety violations where (a) the irregularities were tolerated until the cable operator threatened to file a rate complaint with the Commission, (b) there was no showing that the irregularities posed any immediate danger, and (c) the cable operator was taking steps to cure the irregularities. The Commission refused to permit the termination because this would have encouraged other utilities to threaten other cable operators with termination to prevent them from filing rate complaints with the Commission, and eviction would have resulted in a loss of service. On basically the same grounds, a stay was granted in *Whitney Cablevision* v. *Southern Indiana Gas & Electric Co.*, No. PA-84-0017 (FCC Nov. 16, 1984) (Mimeo 841), but the case was settled before final adjudication on the complaint. In *David Bailey* v. *Mississippi Power & Light Co.*, No. PA-83-0026 (FCC Sept. 11, 1985) (Mimeo 36118), the Commission ordered a utility, which was subject to FCC jurisdiction under the Act because it had agreed to share its poles with one cable company, to make space available to a second cable company where that company offered to pay all expenses associated with the pole attachments, and there was no showing by the utility of any undue inconvenience associated with the common practice of allowing a second company on the poles.

[22] The Acton contract was entered into on June 16, 1980; the Act was enacted in 1978 (J.S. App. 4a, 6a).

full awareness of the fact that the terms of its contracts were subject to review by the FCC to assure that the fees charged were just and reasonable.[23] The record in this case thus persuasively demonstrates that it is more appropriate to treat the Act's provisions as an implied term of the contracts voluntarily entered into by the utilities, rather than as an unexpected condition sufficient to nullify them.

Even if the court of appeals were correct in its conclusion that it would be virtually impossible for Florida Power to terminate its pole attachment agreements, it does not follow that this case falls within *Loretto*'s "very narrow * * * rule that a permanent physical occupation of property is a taking" (458 U.S. at 441). Quite independently of the question of the terminability of the pole attachment agreements as a whole, each agreement makes clear that the cable operator is permitted access only to surplus space on each pole, and that if the utility needs the space for its own service, it may reclaim it (J.A. 20, 106, 135, 213). Contrary to the assumption of appellees (FPC Mot. to Aff. 11 n.12), there is no reason to suppose that the Commission would find such a provision unenforceable. See 47 C.F.R. 1.1403(a) (requiring utility to provide notice before removing cable facilities pursuant to a condition in agreement).[24]

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[23] The Teleprompter contract was finalized on July 1, 1977 (J.S. App. 5a), while the Act was under consideration (*id.* at 4a). Although the Cox contract was initially made in 1963, it provided for a term of at least one year, and was thereafter terminable at will by either party on six months' notice (J.A. [illegible], 213, 223). Thus, Florida Power was on notice of the potential applicability of the Act when it made or failed to terminate each of these contracts.

[24] Such pole-by-pole displacements are less likely to be retaliatory than decisions to terminate economically beneficial agreements in their entirety. Moreover, since the cable operator retains the option of replacing the pole with a larger one, and thereby retaining the attachment, such displacements do not put the cable operator in the situation of either acceding to the demands of the utility or losing the ability to serve its customers—the situation from which the Pole Attachments Act was designed to protect him.

Accordingly, the utility is not, like the landlord in *Loretto*, deprived of the use of the space involved. There is here simply no " 'practical ouster of [the owner's] possession' " of the kind the Court found significant in *Loretto* (458 U.S. at 428, quoting *Northern Transportation Co.* v. *City of Chicago*, 99 U.S. 635, 642 (1879)). See also *St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92, 98-99 (1893) (quoted at 458 U.S. 428-429).[25] Because the cable company's occupation of the space on any particular pole is assured only so long as that space is surplus to the utility's needs, the occupation is not "permanent," as that term is used in *Loretto*.

Indeed, the FCC's regulation of the terms of the rental agreement between the cable operator and the utility is far closer to the type of rent control regulations distinguished in *Loretto* (458 U.S. at 440). This distinction was reaffirmed when the Court dismissed the appeal in *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983), for want of a substantial federal question. As Justice Rehnquist explained in his dissent from that dismissal, in *Fresh Pond* the state court rejected a *Loretto*-based challenge to a local ordinance preventing the eviction of

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[25] See also 458 U.S. at 436, 440-441 n.19, emphasizing the distinction between restrictions on the use of property and situations in which the owner "may have no control over the timing, extent, or nature of the invasion." The utility retains significant aspects of such control here.

tenants from rent-controlled property unless the landlord wished to occupy the premises himself. Although Justice Rehnquist concluded that "[t]here is little to distinguish this case from the situation confronting the Court in [*Loretto*]" (464 U.S. at 877), eight Members of the Court showed their disagreement with that view by dismissing the appeal. Here, as in *Fresh Pond*, the utility has rented its property, the rent is controlled,[26] and the utility retains the right to occupy the premises itself. There is, as in *Fresh Pond*, no Just Compensation Clause problem.

II. THE STATUTORY SCHEME PROVIDES FOR A CONSTITUTIONALLY ADEQUATE DETERMINATION OF JUST COMPENSATION

A. The Statutory Standard Is Consistent With The Just Compensation Clause

Even if the court of appeals were correct in holding that the Commission's pole attachment rate order effects a taking of Florida Power's property, there would be no violation of the Fifth Amendment requirement for "just compensation" here. The FCC is empowered by the Act "to hear and resolve complaints concerning [pole attachment] rates," and "to provide that such rates * * * are just and reasonable" (47 U.S.C. 224(b)). The Act states that "a rate is just and reasonable if it assures a utility the recovery of not less than" the incremental costs resulting from the attachment, nor more than the fully allocated costs (47 U.S.C. 224(d)(1)).

[26] Under the *Loretto* analysis, it makes no difference, for Just Compensation Clause purposes, whether the rent controls are imposed before or after the lease is originally signed. See *American Trucking Ass'ns* v. *United States*, 344 U.S. at 322 n.20 (quoted in note 14, *supra*). Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1004-1014 (1984) (analyzing rational, investment backed expectations before and after change in law). In any event, as we have noted, the agreements at issue here were made or extended in contemplation of the Pole Attachments Act.

Because Congress was establishing a rate regulation system, not providing for the taking of property by condemnation, it did not expressly provide that the "just and reasonable" rate should constitute the measure of just compensation. Nevertheless, here, as in the Emergency Price Control Act considered in *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 124-125 (1950), the statutory standards for the determination of the maximum "just and reasonable" rate[27] are substantially similar to the Just Compensation Clause standard. Accordingly, here, as there, "the congressional purpose * * * require[s] that [the statutory rates] be accepted as the measure of just compensation, so far as that can be done consistently with the objectives of the Fifth Amendment" (339 U.S. at 125). In *United States* v. *Commodities Trading Corp.*, the Court concluded that there was "no constitutional obstacle to treating 'generally fair and equitable' ceiling prices as the normal measure of just compensation * * * [since there was] room for special [judicial] exceptions to such a general rule" (339 U.S. at 128). A similar conclusion is appropriate here.

[27] The Commission regularly determines, as it did here, the "maximum just and reasonable rate" (J.S. App. 44a) that the utility may charge by applying the statutory formula for determining the upper limit of a permissible rate, *i.e.*, the fully allocated costs (47 U.S.C. 224(d)(1)). See *In re Adoption of Rules For The Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, 67-68, 73 (1979).

The recovery of fully allocated costs provides Florida Power with the "just compensation" to which it is constitutionally entitled. *Alabama Power Co.* v. *FCC*, 773 F.2d 362, 367 n.8 (D.C. Cir. 1985); cf. *Permian Basin Area Rate Cases*, 390 U.S. at 770 ("the just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards"); *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 26 (recognizing that a range of reimbursement amounts would satisfy the Due Process Clause).[28]

B. There Is No Unconstitutional Restriction On Judicial Review

Full judicial review of the Commission's pole attachment order is available in the court of appeals (47 U.S.C. 402(a); 28 U.S.C. 2342(1)), which has the power to set an order aside if it is found to be "contrary to constitutional right"—*e.g.*, inadequate

[28] Appellee Florida Power contends (FPC Mot. to Aff. 17 n.19) that the statutory formula is constitutionally inadequate because it deprives the utility of any appreciation in value of the space involved, and "eliminat[es] all consideration of fair market value." Appellees suggest (*id.* at 20 n.22) that the fair market value of the excess space should be determined by the rental price they were able to demand by virtue of their monopoly position. That is flatly inconsistent with the precise purpose of the statute. Although fair market value has normally been utilized as the standard for determining just compensation, "when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards." *United States* v. *Commodities Trading Corp.*, 339 U.S. at 123; see *United States* v. *Cors*, 337 U.S. 325, 332-334 (1949). There is no constitutional obstacle to the legislature's doing the same thing, so long as judicial review remains available. See pages 23-29, *infra*.

to constitute just compensation (5 U.S.C. 706(2)(B)). Although Florida Power simply sought to avail itself of this right to judicial review, the court of appeals found it unnecessary to consider the adequacy of the compensation on the theory that once a taking is established, any scheme for determining just compensation that involves decision-making by a nonjudicial body is unconstitutional.

The rationale of the court of appeals is without support in the Constitution or in the decisions of this Court[29]; it is not surprising that appellees do not endorse it.[30] The Fifth Amendment simply states

[29] Moreover, if the court meant to limit consideration of just compensation claims to Article III courts, it was rejecting the long-standing jurisdiction of the Claims Court, an Article I court (28 U.S.C. 171(a), 172), to consider such claims. See also Fed. R. Civ. P. 71A(h), providing for trial of issue of just compensation in eminent domain proceedings by commission appointed by court.

[30] Appellees assert (FPC Mot. to Aff. 16; Intervenors' Mot. to Aff. 15-16) that the court of appeals determined that the statute is unconstitutional because it forecloses judicial review. We submit that this assertion overlooks the plain language of the decision, which clearly explains the court's view that the FCC has *no* power to determine just compensation, "a decision which has been jealously guarded as being solely within the parameters of the judicial function" (J.S. App. 15a). Without even mentioning the statutory provisions for judicial review, far less finding them inadequate, the court simply concluded that "[t]he determination of just compensation * * * was constitutionally inadequate in this case because it was made by an administrative agency at the behest of Congress rather than by judicial inquiry as required by law" (*id.* at 19a).

In addition, appellees' interpretation is inconsistent with the court's analysis: if that interpretation were correct, the court of appeals would not have reached the question of the adequacy of judicial review without considering first whether

that "private property [shall not] be taken for public use, without just compensation"; it contains no limitation on the means by which the amount of compensation due may be ascertained. And this Court has long recognized the propriety of permitting non-judicial bodies to participate in the process. In *Bauman* v. *Ross*, 167 U.S. 548, 593 (1897), for example, the Court stated that the assessment of just compensation may, in the first instance, "be entrusted by Congress to commissioners appointed by a court or by the executive." Cf. *United States* v. *Jones*, 109 U.S. 513, 519 (1883) (just compensation may be determined by "commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate").

More recently, the Court in *United States* v. *Commodities Trading Corp., supra*, held that the Emergency Price Control Act, which required the Office of Price Administration to establish "generally fair and equitable" ceiling prices subject to carefully circum-

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the compensation provided by statute was constitutionally sufficient. "Congress, of course, has the power to authorize compensation greater than the constitutional minimum" (*United States* v. *50 Acres of Land*, No. 83-1170 (Dec. 4, 1984), slip op. 6 n.14). Accordingly, if the maximum rates determined by the Commission under the statutory formula exceed the constitutional minimum, no question of the adequacy of judicial review arises. But although appellees argue (FPC Mot. to Affirm 16-17; Intervenors' Mot. to Aff. 21-23) that the statutory formula does not provide for the constitutionally necessary compensation, the court below found it unnecessary to address that question (J.S. App. 15a).

In any event, even if appellees' interpretation of the court of appeals' opinion is correct, the conclusion that the statutory scheme provides for constitutionally inadequate judicial review is erroneous, for the reasons explained at pages 27-29, *infra*.

scribed judicial review, satisfied the Just Compensation Clause. Surely a statutory provision providing the administrative agency with *more* guidance in determining just and reasonable compensation cannot for that reason be constitutionally inadequate. Cf. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 529-542 (1935).

Indeed, only two Terms ago, this Court upheld against a just compensation claim a statutory scheme requiring the submission of disputes over compensation to binding arbitration before resort to judicial review. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-1020 (1984).[31]

The reliance of the court below on *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), is misplaced. That case makes clear what no one disputes, namely, that in carrying out its ultimate responsibility to decide whether compensation provided is constitutionally adequate, a court is not bound by any attempt by Congress to limit the scope of its inquiry, but must instead review the statutory limitations to determine whether they are consistent with constitutional requirements. But *Monongahela* does not suggest that Congress or an administrative body must be excluded altogether from the process of determining just compensation. It is sufficient that there be an opportunity for full judicial review of

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[31] As the Court explained in *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 7-8, *Monsanto* held that the property owner "must complete arbitration and, in the event of a shortfall, exhaust its Tucker Act remedies against the United States before it can be ascertained whether it has been deprived of just compensation."

any congressional or administrative decisions with respect to compensation.[32]

That opportunity is fully provided here. Pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342(1), 2343, a proceeding to review a Commission order in a pole attachment proceeding may be brought in the court of appeals for the circuit in which the petitioner resides, or in the United States Court of Appeals for

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[32] None of the other cases cited by the court below (J.S. App. 16a-18a) supports its holding. In *Miller* v. *United States*, 620 F.2d 812, 837-838 (Ct. Cl. 1980), the court simply applied the principle enunciated in *Monongahela* that Congress cannot circumscribe the ultimate judicial determination of whether the compensation provided is constitutionally adequate by prescribing statutory limits on the amount to be paid. *United States* v. *15.3 Acres of Land*, 154 F. Supp. 770, 783 (M.D. Pa. 1957), summarizes the *Monongahela* holding in affirming a commission award of just compensation. *American-Hawaiian Steamship Co.* v. *United States*, 124 F. Supp. 378 (Ct. Cl. 1954), cert. denied, 350 U.S. 863 (1955), involved a claim for just compensation for the taking of a freighter requisitioned for military purposes, in which the court rejected, for the particular case before it, the rate established by the federal agency for such takings. The court noted that "[t]his court, while giving weight to the administrative determination, must nonetheless determine from the facts proven what it thinks is just compensation" (124 F. Supp. at 383).

Finally, contrary to the implication of the court of appeals (J.S. App. 19a), this is not a situation of the kind warned against in *Isom* v. *Mississippi Cent. R.R.*, 36 Miss. 300, 315 (1858), in which the legislature has attempted to "constitute itself the judge in its own case" by condemning property and determining the amount it must pay for it. Instead, in the Pole Attachments Act Congress provided a neutral forum for disputes between private parties—the utility and the cable company with which it had contracted—and established the formula to be applied in resolving those disputes, without attempting to limit judicial review.

the District of Columbia Circuit. The reviewing court has jurisdiction, without limitation, to enjoin, set aside, suspend (in whole or in part), or to determine the validity of such orders (28 U.S.C. 2342 (1)). The court is empowered, "[t]o the extent necessary to decision * * * [to] decide all relevant questions of law, interpret constitutional and statutory provisions * * * [and to] hold unlawful and set aside agency action * * * found to be * * * contrary to constitutional right" (5 U.S.C. 706; see 47 U.S.C. 402(g)).

This judicial review is not circumscribed on its face, and neither the court below nor appellees, when they asked that court in this case to determine the constitutionality of the maximum rates determined by the agency, identified any constitutional inadequacy in the procedure. In fact, this is merely a typical example of the familiar availability of judicial review of administrative rate regulation to assure against the imposition of confiscatory rate requirements. See, *e.g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. at 607.[33] Indeed, judicial review of FCC pole attachment orders has been vigorous.[34]

In this Court, appellees assert that because the record before the Commission is limited to evidence necessary to apply the statutory formula and the court of appeals is limited to reviewing that record, that court cannot perform a constitutionally adequate determination of just compensation. FPC Mot. to Aff. 20-22;

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[33] There is accordingly no need in this case to rely on the availability of a remedy under the Tucker Act, 28 U.S.C. 1491. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1016-1019.

[34] See *Texas Power & Light Co.* v. *FCC*, 784 F.2d 1265 (5th Cir. 1986); *Alabama Power Co.* v. *FCC*, 773 F.2d 362 (D.C. Cir. 1985).

Intervenors' Mot. to Aff. 20-23. Nothing in the opinion below suggests that the court of appeals felt itself unable to consider whether the pole attachment rates approved by the Commission provided constitutionally adequate compensation. More importantly, appellees' novel contention is flatly inconsistent with this Court's precedents. For example, in *American Trucking Ass'ns* v. *United States*, 344 U.S. at 320, the Court explained that "[t]his Court has indicated many times * * * that those concerned with an order affecting their just compensation * * * must be heard; indeed, their right to introduce evidence to support the claim that the order in question will unconstitutionally confiscate their property may be enforced even in the [reviewing] Court, if the Commission bars an opportunity to do so." See also *Convoy Co.* v. *United States*, 200 F. Supp. 10, 15 (D. Ore. 1961), aff'd, 382 U.S. 371 (1966) (citations omitted) ("Generally, a court review of administrative action is limited to the record made before the Commission. The only exception to this rule is where it is claimed that the order under attack will unconstitutionally confiscate property. In such case evidence may be introduced at the time of the hearing on review."). Thus, the dilemma posed by appellees simply did not face the court of appeals. If it had addressed the question whether the Commission order provided just compensation to Florida Power, and if it had found the record (as amplified by judicially noticeable submissions) inadequate to resolve that question, it could have received the necessary additional evidence through procedures pursuant to 28 U.S.C. 2347(b)(3). Alternatively, it could have remanded the case to the Commission, directing it to supplement the record. See *FCC* v. *ITT World Communications*, 466 U.S.

463, 469 (1984). Significantly, appellees never requested an opportunity in the court of appeals to supplement the record by either of these means, or indicated any need to do so.

In sum, it is clear that the scheme of regulation established by the Pole Attachments Act is constitutionally sound. It empowers an expert administrative agency to sift through the conflicting (often technical) facts and claims in a pole attachment complaint proceeding, and to make an assessment of just compensation; it also preserves for the judiciary the power to ensure that the statutory formula is not unconstitutionally confiscatory, and that the agency's calculation of just compensation properly applied that formula to the specific circumstances before it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Nos. 85-1658 (11)
85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR APPELLEE TAMPA ELECTRIC COMPANY

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August 1986

41PP

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit properly found that the Pole Attachment Act of 1978, 47 U.S.C. § 224, which authorizes the permanent physical attachment of cable television equipment to the property of a private utility company, constitutes a taking of the utility company's property, for which just compensation is required?

2. Whether the Eleventh Circuit correctly held the Pole Attachment Act unconstitutional insofar as it authorizes a taking of private property but limits compensation for the taking according to a binding legislative formula, in lieu of the ultimate judicial determination of just compensation required by the fifth amendment to the Constitution?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following parties participated in the proceeding before the Eleventh Circuit: National Cable Television Association, Inc., Cox Cablevision Corporation, Tampa Electric Company,* Mississippi Power & Light Company, Alabama Power Company, Arizona Public Service Company, and Acton Corporation.

* *Statement pursuant to Sup. Ct. R. 28.1*—Tampa Electric Company and its following affiliates are wholly owned subsidiaries of TECO Energy, Inc.: Tampa Bay Industrial Corporation; TECO Transport and Trade Corporation; Southern Marine Management Company; Gulf Coast Transit Company; GC Services Company, Inc.; Mid-South Towing Company; Electro-Coal Transfer Corporation; TECO Coal Corporation; and Gatliff Coal Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1658

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,

Appellees.

No. 85-1660

GROUP W CABLE, INC., *et al.*,

Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,

Appellees.

**On Appeal from the
United States Court of Appeals
for the Eleventh Circuit**

BRIEF FOR APPELLEE TAMPA ELECTRIC COMPANY

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-20a)[1] is reported at 772 F.2d 1537. The memorandum opinions and orders of the Federal Communications Commission and its Common Carrier Bureau (J.S. App. 21a-28a, 29a-35a, 36a-47a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1985 (J.S. App. 48a-49a), and rehearing was denied on November 12, 1985 (J.S. App. 50a-51a). Notices of appeal were filed on December 10, 1985 (J.S. App. 52a-53a; C.J.S. App. 47a).[2] On January 31, 1986, Justice Powell extended the time for docketing an appeal to and including March 10, 1986, and on March 3, 1986, he further extended that time to and including April 9, 1986. The Jurisdictional Statements were filed on that date. Probable jurisdiction was noted on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the Constitution provides in pertinent part that "private property shall not be taken for public use, without just compensation."

[1] "J.S. App." refers to the appendix to the jurisdictional statement filed by the Federal Communications Commission and the United States of America in No. 85-1658.

[2] "C.J.S. App." refers to the appendix to the jurisdictional statement filed by the Cable Appellants, Group W Cable, Inc., National Cable Television Association, Inc., and Cox Cablevision Corporation in No. 85-1660.

The text of the Pole Attachment Act, 47 U.S.C. § 224 (1982 & Supp. III 1985), is set forth at J.S. App. 54a-56a.

COUNTERSTATEMENT OF THE CASE

In these consolidated appeals, the Federal Communications Commission (FCC) and its allied private appellants, Group W Cable, Inc. (Group W), Cox Cablevision Corporation, and the National Cable Television Association, Inc. (collectively, Cable Appellants) seek to overturn the decision of the United States Court of Appeals for the Eleventh Circuit, striking down the Pole Attachment Act (Communications Act Amendments of 1978), as amended, 47 U.S.C. § 224 (1982 & Supp. III 1985), because it effects a taking of private property without just compensation in violation of the fifth amendment to the United States Constitution.

Cable television systems were first developed as a means of extending television service into communities unable to receive television signals because of uneven terrain or distance from television stations.[3] At the outset, cable companies were small, local ventures. They were often owned by rural communities or by television repair shop proprietors. Their primary role was to provide and improve television reception.[4] The first cable television system was established on

[3] Staff of the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess., Telecommunications in Transition: The Status of Competition in the Telecommunications Industry 290, 348 (Comm. Print 1981).

[4] *Id.* at 250.

a noncommercial basis in 1949, with the first commercial system following in 1950.[5]

Due to the FCC's regulatory policies, cable television systems remained largely confined to rural and poor-reception areas through the 1960s and early 1970s. In the mid-seventies, several developments occurred which dramatically accelerated the growth of cable television.[6] With the removal of many of the previous restrictions on the development of the industry, cable television moved into the large (and highly lucrative) urban and suburban markets.[7] At the same time, more and more cable systems were brought under the ownership of huge corporate com-

[5] H.R. Rep. No. 1635, 89th Cong., 2d Sess. 5 (1966).

[6] In 1976, the FCC permitted the cable systems to choose which television signals they wished to import. This decision allowed them to select signals from stations with the most popular programming. Cable Television Leapfrogging Rules, Report and Order, 57 F.C.C.2d 625 (1976). With the development of low-cost satellite interconnection, several "superstations"—major market independent stations transmitting via satellite—developed. FCC Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation*, Vol. I, 108 (Final Report) (1980). The opportunity for pay programming networks (and the successful cable television movie networks), many of them fed by satellite, was provided by the *Home Box Office* decision. *Home Box Office Corp. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

[7] National Association of Broadcasters, *Great Expectations: A Television Manager's Guide to the Future* 19 (Apr. 1986).

munications enterprises.[8] Cable television is now big business,[9] and immensely profitable.[10]

The cable television industry has employed its increasing profits in an aggressive campaign to obtain favored status from legislative and regulatory bodies. In 1978, after a prolonged and intense lobbying campaign, the cable television interests persuaded Congress to pass the Pole Attachment Act. The Act endowed the FCC with the authority to regulate the rates, terms, and conditions for the attachment of cable television equipment to utility poles that are the property of investor-owned utility companies only (the statute expressly excludes from FCC jurisdiction the

[8] The top seven cable system operators number their subscribers in the millions and their systems in the hundreds. Three of the systems (including Group W) operate in well over half the states. Leepson, *Cable Television: Coming of Age*, Vol. II, No. 24 Congressional Quarterly Editorial Research Reports 967 (Dec. 27, 1985) [hereinafter cited as "Leepson"].

[9] Group W was recently sold to a consortium of cable communications operators and interests. The cash proceeds from this sale, according to Group W's former parent company, Westinghouse Corporation, were estimated to be approximately $1.6 billion. Westinghouse Electric Corporation Annual Report (Form 10-K) to the Securities and Exchange Commission (Dec. 1985).

[10] The president of United Cable Television Corporation, the eighth-largest cable operator, stated in reference to mature cable television systems: "You open the door Monday morning, and there's a huge pile of cash." *Quoted by* Vamos & Atchison in *Cable TV, Older and Wiser, Looks Like a Good Bet Again*, Business Week, July 22, 1985, at 126, *cited in* Leepson, *supra* note 8. Cable company officials have estimated that a good cable system can attain a 30 to 50 percent operating margin between income and expenses. *Cable Turning Red Ink to Black*, Vol. 17, No. 44 National Journal 2480 (Nov. 2, 1985).

poles owned by municipal and cooperative utility companies). 47 U.S.C. §§ 224(a)(1), (a)(3), (a)(4), and (b)(1). In the Act, Congress stated that the purpose of the FCC's regulation is "to provide that such rates, terms, and conditions are just and reasonable," and prescribed the following formula for the determination of a "just and reasonable" rate:

> [A] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1).[11]

Tampa Electric Company is an investor-owned utility (as is Florida Power Corporation), with headquarters in Tampa, Florida, providing electric service to customers in portions of the State of Florida. An investor-owned utility, as distinguished from a municipally or publicly owned utility and from a cooperative or customer-owned utility, is similar to any other private business corporation in that its stock

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[11] This congressionally prescribed formula applied by the FCC to establish the maximum rate for the attachment of cable television equipment to poles owned by investor-owned utilities in practice can be expressed as follows:

$$\text{Maximum Rate} = \frac{1 \text{ foot}}{13.5 \text{ feet}} \times \text{Operating Expenses} + \text{Capital Costs of Poles}$$

and, therefore, the company are owned by private shareholders. The rates, terms, and conditions of the utility service provided by Tampa Electric and Florida Power, supplying electric energy, are subject to regulation by the Public Service Commission of the State of Florida. The rates, terms, and conditions under which Tampa Electric and Florida Power allow cable television operators to attach their equipment to poles owned by the utilities were regulated (until the decision of the Eleventh Circuit) by the FCC under the Pole Attachment Act, as both utilities are investor-owned. Furthermore, the other statutory precondition for FCC regulation of pole attachment rates is also present—the rates are not regulated by the State of Florida. *See* 47 U.S.C. § 224(c)(1). At the request of Group W's predecessor, Teleprompter Corporation, the Supreme Court of Florida held in 1980 that the Florida Public Service Commission does not have jurisdiction to regulate the rates, terms, and conditions of pole attachment agreements. *Teleprompter Corp. v. Hawkins*, 384 So. 2d 648, 649–50 (1980) (citing *Southern Bell Telephone & Telegraph Co.*, 65 P.U.R.3d 117, 119–20 (Fla. Pub. Serv. Comm'n 1966)).[12]

Regulation of cable attachment rates by the FCC under the Pole Attachment Act undoubtedly has exceeded even the fondest hopes of the cable television interests when they entreated Congress for the legislation and opposed pole attachment regulation by the states. *See Teleprompter Corp. v. Hawkins*, *supra*. The FCC has reduced drastically the pole attachment

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[12] In opposing state regulation of pole attachment rates in this litigation, Teleprompter Corporation was represented by the law firm of Hogan & Hartson, Washington, D.C., along with local counsel. *Teleprompter Corp. v. Hawkins*, 384 So. 2d 648 (1980).

rates agreed to in contracts between the cable companies and investor-owned utilities.[13] In this case, the FCC reduced Florida Power's rates to less than a third of the contract rates. J.S. App. 5a. In fact, the FCC reduced the pole attachment rates agreed to by Group W and Acton CATV below the rates requested by the cable companies. *Id.* at 7a.

The FCC has not confined its largesse to the cable industry to drastic reductions in negotiated pole attachment rates. In the case of *David Bailey d/b/a Port Gibson TV v. Mississippi Power & Light Co.*, FCC Mimeo No. 36118 (Sept. 11, 1985) (*Port Gibson*), the FCC ordered a utility to allow access to its poles for the attachments of a cable operator which had no existing attachments. This order was issued in spite of the fact that the addition of the new cable company would require the utility to replace approximately 50 percent of its poles, and was predicated merely on the fact that another cable company had attachments on the poles. The FCC has neither released the utility from this order for compulsory access, nor disavowed the authority and intention to make additional such orders in the future.

Despite cable television's explosive and ubiquitous growth, tremendous assets, and established profitability, the cable companies claim the stakes involved in these appeals are nothing less than "the economic survival of an important interstate communications

[13] *See, e.g., Telecommunications, Inc. & Community Television Communications v. Mountain States Tel. & Tel.*, PA-82-0023, FCC Mimeo No. 1498 (Dec. 27, 1983) (rate reduced from $4.00 to $.83); *Group W Cable, Inc. v. Lake Superior District Power Co.*, PA-82-0065, FCC Mimeo No. 2839 (Mar. 12, 1984) (rate reduced from $4.00 to $1.11).

service" (Group W Brief at 21) and the very "existence of an independent cable television industry" (Nor-West Cable Communications and Preferred Communications, Inc. Amicus Brief at 3). Actually, the cable companies have enjoyed unprecedented preferential treatment and protection from Congress and the FCC, competitive advantages they wish to perpetuate.

Cable operators enjoy favored treatment under a number of statutes and regulations, including the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 (Supp. III 1985) (Cable Act). Section 543 of the Cable Act eliminates onerous rate regulation by local franchising authorities.[14] Cable industry analysts estimate that this portion of the Cable Act will result in an additional $500 million in profits to cable companies by 1990.[15]

Cable's protected status is ironic in view of the fact that most cable operators enjoy a monopoly position with respect to the provision of cable television service in the areas they serve due to their franchise agreements with municipal authorities. As a result of the start-up costs of constructing cable television systems,[16] many markets only attract one operator will-

[14] Under an FCC rule implementing this section of the Cable Act, beginning January 7, 1987, cable operators will be able to establish their own rates for basic service in franchise areas served by a minimum of three broadcast stations. 50 Fed. Reg. 18,637, 18,649 (May 2, 1985), 58 R.R. 2d 1 (1985).

[15] Leepson, *supra*, note 8 (citing Arthur D. Little, Inc., *Prosperity for Cable TV: Outlook 1985-1990* (May 1985)).

[16] *See Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 128 (7th Cir. 1982); *Berkshire Cablevision v. Burke*, 571 F. Supp. 976, 985 (D.R.I. 1983).

ing to provide such a system. *See Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 899–900 (W.D. Mo. 1985) (single cable franchise permissible where the physical and economic conditions of the relevant market give rise to a "natural monopoly" situation). The Cable Act grants cable operators the benefit of a renewal expectation which effectively entitles them to a permanent franchise. 47 U.S.C. § 546.

Despite the cable industry's favored economic and regulatory treatment and the advantage of a monopoly market position, cable companies have shown a propensity to renege on their contractual agreements. Thus, not only have cable operators sought FCC intervention to reduce their negotiated pole attachment rates, they have attempted to restructure to their advantage the terms of their contracts to provide facilities and service in franchise areas across the country.[17]

Cable companies have been permitted to use the private property of others to the benefit of their shareholders. They have sought and obtained pref-

[17] There have been a number of highly publicized franchise renegotiations, most notably, Warner Amex Cable Communications, which approached officials in Dallas, Milwaukee, and other cities in 1984 and said it would abandon its franchises if the cities did not agree to cutbacks in service. The cities, fearing they would do no better with someone new, acquiesced. Cable systems also have been scaled back in Pittsburgh, Miami, Los Angeles, Denver, Tucson, and Portland, Oregon. Systems partly built or still on the drawing board (including those in Chicago, Washington, D.C., and Philadelphia) also have been delayed while the cable companies try to renegotiate their parts of the bargain. *Cable Turning Red Ink to Black, supra* note 10, at 2480.

erential economic regulation despite their monopoly status in many markets. Finally, they have been permitted to renegotiate the terms of, and renege on, their contracts with both private and municipal interests. All of these factors have helped to make the cable industry extremely profitable. Annual revenues of cable operators are expected to double between 1984 and 1990 (to $16.5 billion), and their *profits to triple* (to $1.7 billion).[18]

SUMMARY OF ARGUMENT

The Pole Attachment Act of 1978, 47 U.S.C. § 224, authorizes the permanent physical attachment of cable television equipment to the property of investor-owned utilities. Under the traditional judicial interpretation of the takings clause of the fifth amendment to the Constitution, recently reaffirmed and applied by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (*Loretto*), such governmentally authorized physical occupation of private property unquestionably constitutes a *per se* taking.

The attachment of cable television equipment to privately owned utility poles authorized by the Pole Attachment Act is indistinguishable from the attachment of cable television equipment to privately owned rental property authorized by the New York statute that was found to effect a *per se* taking in *Loretto*. Investor-owned utilities are entitled to the full protection of their private property rights under the fifth amendment against such a taking without the payment of just compensation.

[18] Solomon, *Cable TV Is at a Crossroads—Trying to Figure Out What It Ought to Be*, Vol. 17, No. 44 National Journal 2478 (Nov. 2, 1985) (citing Little, *supra* note 15).

The FCC does not provide just compensation to utilities for pole attachments, but merely establishes rates according to a binding formula set forth by Congress in the Pole Attachment Act. The Act is therefore unconstitutional since the FCC's determination of maximum pole attachment rates under the binding formula prescribed by Congress fails to provide the ultimate judicial determination of just compensation required by the fifth amendment.

ARGUMENT

I. The Eleventh Circuit Correctly Applied the Traditional Takings Analysis of *Loretto* to the Facts of this Case.

A. The Permanent Physical Occupation of Florida Power's Utility Poles by Cable Television Equipment Constitutes a *Per Se* Taking Under the Rule Reaffirmed in *Loretto*.

The fifth amendment to the United States Constitution prohibits the taking of private property for public use without the payment of just compensation. From the earliest judicial interpretations of the fifth amendment takings clause, the courts have consistently held that a permanent physical occupation or invasion of private property, authorized by the government, is a taking, without regard to any other factors, *i.e.*, a *per se* taking. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872) (real estate which is "actually invaded" by superinduced additions or by having any artificial structure placed on it is taken within the meaning of the fifth amendment). *See also Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979); *United States v. Causby*, 328 U.S. 256, 265 (1946); *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 100–02 (1893).

In the recent *Loretto* decision, involving facts remarkably similar to the present case,[19] this Court reviewed and reaffirmed the traditional rule that a permanent physical occupation constitutes a *per se* taking of private property. *Loretto* at 434–35. In *Loretto*, this Court held that a New York statute authorizing cable television attachments to apartment buildings effected a taking of the owner's property. The Court had no difficulty in determining that such attachments were within the established *per se* rule:

> Teleprompter's cable installation on appellant's building *constitutes a taking under the traditional test*. The installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.

Id. at 438 (emphasis added).

The Eleventh Circuit, faced with the same direct physical attachment of "plates, boxes, wires, bolts and screws" to the utility poles owned by Florida Power, found that "*Loretto* and the instant case are virtually indistinguishable" with respect to the nature of the occupation of private property.[20] J.S. App. 14a. Cable

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[19] Not only did *Loretto* also involve the permanent physical attachment of cable television equipment, but the cable operator seeking the attachment was Teleprompter, Group W's predecessor-in-interest.

[20] The District of Columbia Court of Appeals noted that the permanent physical attachment of such cable equipment to utility property was "clearly" a taking under the authority of *Loretto*. *Alabama Power Company v. FCC*, 773 F.2d 362, 367 n.8 (D.C.

attachments of the same character as those at issue in *Loretto* led the Eleventh Circuit to the inescapable conclusion that its decision was controlled by *Loretto*. J.S. App. 14a. Following the traditional analysis, reaffirmed in *Loretto*, that a permanent physical occupation constitutes a *per se* taking, the Eleventh Circuit correctly held that the Pole Attachment Act effects a taking of an investor-owned utility's private property.

Recognizing the vulnerability of their position under the traditional takings analysis applied in *Loretto*, the Cable Appellants attempt to stand takings clause precedent on its head. They argue for the application to the Pole Attachment Act of a construct they describe as the Court's "traditional multifactor balancing test," and they contrast it with the supposedly "unique" and "narrow" holding of *Loretto*. Group W Brief at 24 n.55.

The contention of the Cable Appellants is based on a complete reversal of the history of judicial interpretation of the takings clause. From the earliest cases, there has never been any doubt that a governmentally authorized permanent physical occupation constitutes a taking of private property. *See, e.g.*, *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U.S. 540 (1904); *St. Louis v. Western Union Telegraph Co.*, *supra*; *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878). This is the traditional rule, which was reaffirmed and applied in *Loretto*. It is "narrow" or "unique" only in the sense

Cir. 1985) (vacating FCC's decision that pole attachment rates of electric utility companies were excessive; and noting, without reaching the issue, that the physical attachment of cable equipment to the utility poles would be a taking under *Loretto*).

that it applies to that certain class of governmental actions which create permanent physical occupation of property.

Fifth amendment jurisprudence evolved to recognize that the government could effectively take property by actions which do not involve actual physical occupation but which substantially reduce its economic value. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). It was in the context of cases involving this expanded concept of a taking that the Court developed the "multifactor balancing test."[21] However, as the Court indicated in *Loretto*, where the governmental action involves a permanent physical occupation, even a "minor" occupation constitutes a taking, without regard to its economic impact. 458 U.S. at 434-35. *See United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (government's physical occupation of mine constituted a *per se* taking even though the mine continued to be operated by, and for the profit of, the original owner).

The permanent physical occupation in the present case is indistinguishable from that adjudicated in *Loretto*. *See infra* at 16-20. Thus, it is a taking *per se*,

[21] Under this analysis, the courts, in determining whether a government regulation or restriction on property constitutes a taking, will balance such factors as the economic impact of the regulation, the degree of interference with investment-backed expectations, and the character of the governmental action against the public good or benefit to be promoted by the regulation. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

and the multifactor balancing test simply is not implicated. The Eleventh Circuit's conclusion, based on traditional fifth amendment precedent, is not only proper but necessary under the principles of *stare decisis*. The decision should be affirmed.

B. Appellants Have Failed to Distinguish *Loretto*.

Recognizing that the permanent physical occupation of Florida Power's utility poles by cable television equipment is a taking *per se* under the traditional rule reaffirmed by this Court in *Loretto*, appellants try to distinguish this case from *Loretto* by alleging that the occupation is not sufficiently permanent and that Florida Power consented to the occupation under its contracts with the cable operators. The Eleventh Circuit addressed these same arguments, and properly concluded that "the instant case is not distinguishable from *Loretto* on the basis of either uninvited access or permanency of the occupation. *Loretto* therefore controls . . . ." J.S. App. 14a.

Appellants argue that *Loretto* is inapplicable because the invasion or occupation is not permanent inasmuch as Florida Power's contracts with the cable operators contain provisions allowing the utility to reclaim pole space occupied by cable attachments if needed for utility service. Government Brief at 18; Group W Brief at 25–26. This argument assumes that the FCC would allow Florida Power to refuse the cable companies continued access according to the terms of the pole attachment contracts, an assumption which the Eleventh Circuit found ignores "the hard reality of the matter." J.S. App. 11a. The "hard reality" referred to by the Eleventh Circuit is the fact that the FCC has consistently refused to allow utilities to discontinue pole attachments according to

their contractual rights—even when the utilities' attempts to do so are based on breaches of the contracts by the cable companies, such as placing unsafe and unauthorized attachments on the poles.[22]

In light of the FCC's established practice of staying every attempt by a utility to disconnect cable attachments for any reason as "retaliatory," the Eleventh Circuit found that Florida Power in fact is "powerless to," exclude the cable companies from its poles. J.S. App. 12a. The government has failed to provide any indication that "Florida Power, or any utility for that matter, could issue a disconnect order under such circumstances and have it escape being deemed retaliatory by the FCC." J.S. App. 12a n.4. Based on the reality of the FCC's implacable hostility to disconnection requests by utilities, which the agency has neither denied nor promised to abandon, the Eleventh Circuit quite appropriately rejected the argument that the theoretical possibility of disconnection under the

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[22] *Whitney Cablevision v. Southern Indiana Gas & Elec. Co.*, FCC Mimeo No. 841 (Nov. 16, 1984) (Utility attempted to exclude cable company by ordering it to remove its property because of unauthorized and unsafe pole attachments which breached the parties' contract. FCC stayed the utility's efforts to remove the equipment after determining that the cable company was "reasonably likely to show" that the attempted termination was motivated by the utility's wish to avoid pole attachment rate regulation); *Tele-Communications, Inc. v. South Carolina Elec. & Gas Co.*, FCC Mimeo No. 3994 (Apr. 19, 1985) (FCC superseded its previous grant of a temporary stay with a final order preventing the utility from terminating the pole agreement despite the utility's reliance on numerous safety violations and unauthorized attachments by the cable operator as justification for the termination and the utility's provision of six months' notice of termination).

terms of Florida Power's contracts,[23] rendered the cable attachments less permanent than those in *Loretto*.[24]

The Eleventh Circuit also properly rebuffed appellants' attempt to distinguish *Loretto* on the theory that cable access to Florida Power's poles was granted voluntarily by contract rather than authorized by the government. As an initial matter, the existence of a contract for access is not even a factual distinction between the two cases since the original cable attachment to the apartment building in *Loretto* occurred pursuant to such a contract. 458 U.S. at 421–22. Furthermore, the Eleventh Circuit correctly found that the original "invitation" for the cable companies to have access to Florida Power's poles "was made subject to and based upon certain conditions, namely the agreed-upon annual per pole rate." J.S. App. 10a–11a. Thus, although the cable companies "may have been invited at the outset, *they certainly weren't invited at the rate imposed by the FCC*." *Id.*

[23] Furthermore, in *Loretto*, the Court specifically noted that leaving a property owner with only the right to exclude—out of all his bundle of property rights—under the condition he uses the property in one particular manner, does not negate the property owner's right to compensation for the physical occupation. *Loretto*, 458 U.S. 419, 439 n.17.

[24] Actually, the Eleventh Circuit concluded that "the extent of occupation in [this case] not only satisfies *Loretto*'s permanency requirement, but significantly exceeds it," *Florida Power Corp. v. FCC* (J.S. App. 13a), because, while the property owner in *Loretto* could force the cable company to disconnect, Florida Power would most likely not be permitted to do so. "It is apparent from *Loretto* that when the Court speaks in terms of a permanent physical occupation, it does not necessarily mean that the occupation is one which will last forever." *Id.*

(emphasis added). It is hornbook law that a property owner's consent for a stranger to enter his property subject to a condition or limited authorization does not imply continued consent if the condition is not met or the limitations on the authorization are exceeded. *See* Restatement (Second) of Torts § 168 (1965).

The FCC's orders, which required the attachment of the cable operator's equipment to Florida Power's poles at one-third the contract price, effectively nullified the condition (payment of the agreed upon rates) under which the cable operators were originally permitted access to Florida Power's property. The cable companies, having exceeded the limitation placed upon their invited entry, are no less trespassers than if they had entered upon the property with no authorization at all. "[B]y insisting on a significantly lower rate [than the one agreed to], the cable companies have themselves transformed their status from that of an invitee, to use their own terms, to *that of an unwanted guest*." J.S. App. 9a (emphasis added).

The appellants draw another meaningless distinction between the New York statute in *Loretto*, which contains language prohibiting landlords from interfering with cable attachments, and the Pole Attachment Act, which does not include a provision specifically ordering utilities to allow cable attachments. Government Brief at 14; Group W Brief at 28. This argument both ignores the actual effect of the FCC's regulation under the Pole Attachment Act, and is disingenuous, particularly on the part of the government, in light of the FCC's interpretation of its authority under the Act. The FCC's pole attachment rate orders, combined with the agency's refusal

to allow disconnection for any reason, mandate continued occupation of utility property by cable companies for compensation far less than provided in the contracts under which the occupation began. Furthermore, in the *Port Gibson* case, which the government barely deigns to mention (Government Brief at 17 n.21), the FCC has asserted authority under the Pole Attachment Act to require initial access by a cable company to utility poles merely because another cable company has been allowed access. *Port Gibson*, FCC Mimeo No. 36118 (Sept. 11, 1985).

C. Investor-Owned Utilities Are Entitled to Full Constitutional Protection of Their Property Rights Under the Fifth Amendment.

In addition to realleging the same theories for distinguishing *Loretto* rejected by the Eleventh Circuit, appellants now attempt to carve out of the fifth amendment property guarantees a "regulated industry" or "utility" exception. Government Brief at 14; Group W Brief at 22 & n.51. The argument for such an exception is contrary to the precedent of this Court, a fact which the appellants attempt to avoid by misapplying cases which arose in very different contexts and involved distinct legal principles from the case at bar.

In construing the fifth amendment rights of public utilities (and highly regulated industries, *e.g.*, the railroads), the courts have held uniformly through the years that these industries enjoy full constitutional protection against the taking of their private property without just compensation. In 1904, this Court rejected the argument that a railroad company could not exclude a telegraph company's poles from the railroad right-of-way because the property was de-

voted to a public service and subject to government regulation. *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U.S. 540, 573 (1904). The Court succinctly articulated the principle that a private business which engages in a regulated public service does not thereby forfeit the protection of the fifth amendment:

> The right-of-way of a railroad is property devoted to a public use, and has often been called a highway, and as such is subject, to a certain extent, to state and Federal control; and for this many cases may be cited. But it has always been recognized, as we have pointed out, that a railroad right-of-way is so far private property as to be entitled to that provision of the Constitution which forbids its taking, except under the power of eminent domain and upon payment of compensation.

Id.

The fact that Florida Power's utility poles are dedicated to the provision of electric service to the public and that the rates for such service are regulated by the Florida Public Service Commission[25] does not subject the poles to an uncompensated taking for cable television attachments.[26] Thus, in a case where a town

[25] The appellants claim that Florida Power is subject to regulation, and, therefore, enjoys fewer fifth amendment rights than the property owner in *Loretto*. In *Loretto*, the cable operators argued that Ms. Loretto was subject to extensive regulation as a landlord, thus *less than fully protected* under the fifth amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439–40 (1982).

[26] That Florida Power enjoys full fifth amendment rights in

had allegedly exercised its police power to declare part of a railroad's driveway a taxicab stand, this Court held that just compensation to the railroad must be paid by the town for its use of the railroad's private property. *Delaware, Lackawanna & Western Railroad Co. v. Town of Morristown*, 276 U.S. 182 (1928). "The railroad grounds, station, platforms, driveways, etc., are used by the [railroad] for the purposes of its business as a common carrier; and, while that business is subject to regulation in the public interest, the *property used belongs to the* [*railroad*]. The state may not require *it to be used in that business, or take it for another public use, without just compensation* . . . ." *Id.* at 193 (citations omitted) (emphasis added).

The Cable Appellants concede, as they must, that some "[u]tility property can be the subject of an unconstitutional taking," *e.g.*, a utility's office building. Group W Brief at 22 n.51. These appellants thereby suggest that investor-owned utilities enjoy fifth

its utility poles is highlighted by a related line of cases which have analyzed whether a utility's ratepayers have any interest in the utility's "devoted-to-public-use" property. The decisions have consistently held that, by paying bills for service, utility customers do not acquire any interest, legal or equitable, in the property purchased by the utility for the conduct of its business. "Customers pay for service, not for the property used to render it." *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 32 (1926). *See Philadelphia Suburban Water Co. v. Pennsylvania Pub. Util. Comm'n*, 58 Pa. Commw. 272, 427 A.2d 1244, 1246–47 (1981) (ratepayers do not gain any interest in assets from sale of land held by utility); *Boise Water Corp. v. Idaho Pub. Util. Comm'n*, 99 Idaho 158, 578 P.2d 1089 (1978) (same). Ratepayers do not gain any interest in the utilities' "public use" property because it is the utilities' *private* property, protected by the full panoply of fifth amendment guarantees.

amendment guarantees with respect to only certain property. The speciousness of the attempted distinction is illustrated by the following example: It is very possible that a cable operator would decide to attach its cable equipment to a utility's *office building* as a means of continuing its cable path. Such a situation is hardly a mere hypothesis in light of Teleprompter's insistence on attaching to Ms. Loretto's apartment building. Although the Cable Appellants have suggested that a utility's office building is entitled to greater fifth amendment protection than its poles, there can be no doubt that, should the occasion present itself, the cable companies would claim that Congress could enact a statute authorizing the attachment of cable equipment to a utility's building without just compensation. The only apparent basis of distinction by the cable industry between property which enjoys constitutional protection and property which does not is whether the property is a present candidate for the installation of cable equipment.[27]

[27] Cable Appellants attempt to distinguish between a utility's poles and its other property by asserting that the poles are an "unintended bottleneck to the provision of cable services." Group W Brief at 22. The bottleneck doctrine is a principle of antitrust law, and is irrelevant to fifth amendment takings analysis. The so-called "interconnection" cases—which deal with this essential facilities doctrine of antitrust law—provide no support for appellants' argument. The essential business facility or "bottleneck" doctrine provides that "a business or group of businesses which controls a scarce facility has an obligation to give *competitors* reasonable access to it." *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979) (emphasis added). *See MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983) (listing four elements necessary to establish antitrust liability under the doctrine), *cert. denied*, 464 U.S. 891 (1984). Regulation of bottleneck facilities, including the

Grasping for a distinguishing factor, appellants attempt to characterize this case as one involving the "commonplace regulation of utility property," (Group W Brief at 18), and Florida Power's efforts to vindicate its fifth amendment property rights as simply "assert[ing] the 'right' to be free from regulation" of the rates it charges for attachment of cable television equipment and wires to its utility poles. Government Brief at 14-15. Appellants' arguments are based on the erroneous premise that this case involves only the regulation or restriction on the *use* of property, instead of an actual physical occupation.[28]

ordering of physical interconnections between a bottleneck facility and another service system, has been developed to foster competition between service providers and prevent antitrust violations. Florida Power and the cable companies provide different services and products. Indeed, at the insistence of Group W's predecessor, Teleprompter, the Florida Supreme Court held that the Public Service Commission, which regulates Tampa Electric and Florida Power, could not regulate pole attachment agreements because the Commission did not have statutory authority over the cable television industry. *Teleprompter Corp. v. Hawkins*, 384 So. 2d at 649-50 (citing *Southern Bell Tel. & Tel. Co.*, 65 P.U.R.3d 117, 119-20 (Fla. Pub. Serv. Comm'n 1966)). The utilities are not "competitors" of cable television companies, and cannot be compelled under the essential facilities doctrine to yield their private property for attachment or interconnection by the cable companies. Florida Power's poles are not a "bottleneck" in terms of this specific antitrust doctrine, but only in the legally irrelevant sense that the cable companies find it convenient to occupy them.

[28] Thus, *Munn v. Illinois*, 94 U.S. 113 (1877); *Nebbia v. New York*, 291 U.S. 502 (1934); *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662 (1935); and *Los Angeles Gas & Elec. Corp. v. Railroad Comm'n*, 289 U.S. 287 (1933) are all regulatory ratemaking cases, while *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951) involved discontinuance of railroad

The proposition that Florida Power's status as a regulated electric utility does not diminish its fifth amendment property rights is supported by this Court's recent decision in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 106 S. Ct. 903 (1986), striking down a requirement that the utility allow third parties to place messages in its billing envelopes. The Court rejected arguments that regulation of utility service circumscribes an investor-owned utility's first amendment right to be free of government restriction on its speech or its fifth amendment right to be free of government confiscation of its private property interest in billing envelopes. *Id.* at 912.

service. In none of these cases was a *permanent physical* occupation of property at issue. For example, in *Munn*, this Court stated that the elevator owner could free himself from the regulatory rates and charges pertaining to storage of grain by "discontinuing the use" of the grain elevators. 94 U.S. at 126. The owner was subject to regulation by the public only so long as he devoted his property to a "public use." *Id. See also Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396, 399 (1920); *Wilson v. New*, 243 U.S. 332, 384-85 (1917) (Pitney, J., dissenting). The FCC's decisions clearly show that it will not allow Florida Power to simply "discontinue its use" of renting pole space to the cable operators to attach their equipment. The FCC routinely grants stays—temporary and permanent—to preclude the utility companies from discontinuing or excluding the cable companies from their poles. *See* note 22, *supra*. The legislative history of the Pole Attachment Act also indicates that the utilities cannot avoid cable attachments merely by withdrawing the "use" of their property. The Committee Report expressed the view that a utility might conceivably wish to discontinue or withdraw from an agreement "simply in order to avoid FCC regulation," and that the FCC might properly find such conduct unjust and unreasonable. S. Rep. No. 580, 95th Cong., 1st Sess. 16 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess. 109, 124.

The real essence of appellants' position is that the taking of Florida Power's property is justified because it helps promote the growth and availability of cable television, which is claimed to be in the public interest and benefit. Such public benefit, however, while it may *justify* the taking, does not alter the confiscatory nature of the governmental action. Nor does service of the public interest excuse the payment of just compensation for such a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415–416 (1922). Social utility merely satisfies that part of the takings clause which requires that the exercise of the power of expropriation be for a "public use."

The appellants also argue for a utility exception to the fifth amendment with the assertion that a utility need not be compensated for the use of its property by cable companies since electric ratepayers will provide a return on the investment in that property anyway. Government Brief at 11; Group W Brief at 7. The essential unfairness and illogic of this cavalier treatment of the private property rights of utilities and the interests of their ratepayers was exposed by the Fifth Circuit:

> Texas Power is indeed performing its responsibility to its utility users by minimizing their rates to the extent that other enterprises benefit from the use of property that is in effect paid for by utility users. The question is not, as Group W puts it, how much cable should subsidize Texas Power but how much cable and cable subscribers may benefit from the use of Texas Power's property without reimbursing that company.

Texas Power & Light Co. v. FCC, 784 F.2d 1265, 1272 (5th Cir. 1986).

The permanent physical occupation of Florida Power's utility poles by cable television equipment, authorized by the FCC under the Pole Attachment Act, effected a taking *per se* under the traditional rule recently reaffirmed in *Loretto*. Just compensation to Florida Power for this taking is required by the fifth amendment.

II. The Pole Attachment Act Is Unconstitutional Because It Limits Compensation for the Taking of Utility Property According to a Binding Congressional Formula.

The appellants mischaracterize the Eleventh Circuit's decision as standing for the proposition that an administrative agency may never determine just compensation in the first instance. Government Brief at 23 n.30; Group W Brief at 35. Fairly read in the context of the Pole Attachment Act, the Eleventh Circuit's opinion states the more limited holding that the FCC's regulation of pole attachment rates *pursuant to a binding rule established by Congress* offends the Constitution by imposing a legislative limit on just compensation, which must be determined ultimately by the judiciary. This element of the Eleventh Circuit's decision is not a novelty, as caricatured by the appellants, but follows established precedent.

A. A Legislative Limit on Just Compensation Violates the Constitutional Separation of Powers.

Congress cannot, without violating the Constitution, limit the scope of the inquiry into the appropriate measure of just compensation for a taking of private property, an issue which the Constitution entrusts to

the judiciary for ultimate determination. "As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the Constitution. Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment." *Baltimore & Ohio Railroad Co. v. United States*, 298 U.S. 349, 364–65 (1936); *accord American-Hawaiian Steamship Co. v. United States*, 129 Ct. Cl. 365, 369-71, 124 F. Supp. 378, 382–83 (1954), *cert. denied*, 350 U.S. 863 (1955). *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893) (it does not rest with Congress to say what compensation shall be paid, or even what shall be the rule of compensation). In deference to this precedent, even the government has admitted the continuing force of case law holding that the courts have the ultimate responsibility to determine whether the compensation provided is constitutionally adequate and that the courts' inquiry may not be circumscribed by Congress. Government Brief at 25.

The FCC establishes maximum pole attachment rates according to the formula prescribed in the Pole Attachment Act. *See supra* at 5-7. The formula operates as a statutory limit on the compensation provided to utilities. This regulatory scheme effectively renders Congress judge of the amount of compensation it will pay for its own taking of private property.

Such a combination of legislative and judicial functions in the Congress transgresses the basic constitutional separation of powers. The separation of powers lies "at the heart of the Constitution," *Buckley v. Valeo*, 424 U.S. 1, 119 (1976), and is embodied

in its "very structure." *INS v. Chadha*, 462 U.S. 919, 946 (1983). The continued viability and importance of this fundamental premise of our democracy was recently affirmed by this Court's decision in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), which declared the "Gramm-Rudman-Hollings Act" unconstitutional.

The Pole Attachment Act deprives Florida Power of any opportunity to have a determination made—by an unfettered judicial inquiry—as to what constitutes just compensation. Instead, the compensation is limited by the statutory formula enacted in the Pole Attachment Act. The Eleventh Circuit thus quite properly invalidated the FCC's pole attachment ratemaking under the statutory formula as inconsistent with the constitutionally mandated division of responsibility for the decision of *what* private property need be taken for the public use (a legislative function) and for the determination of the award and amount of just compensation for that taking (a judicial function).

B. The Opportunity for Limited Appellate Review of Pole Attachment Rate Orders Does Not Satisfy the Constitution.

Appellants assert that FCC ratemaking under the Pole Attachment Act satisfies the constitutional requirement for an ultimate judicial determination of just compensation based on the availability of judicial review of the administrative action. Government Brief at 22, 25-29; Group W Brief at 31. Appellate review of the FCC's application of a statutory formula, which does not even purport to provide just compensation for a taking under any traditional measure, falls far short of providing the necessary judicial determination.

Appellate review of FCC pole attachment rate orders under the Administrative Procedure Act (5 U.S.C. § 706) is limited to consideration of the record developed before the Commission.[29] The administrative record in pole attachment proceedings only contains evidence which the FCC deems relevant to its

[29] "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 105 S. Ct. 1598, 1607 (1985). The government now asserts that the Pole Attachment Act can be saved by the theoretical ability of an appellate court to receive evidence outside the administrative record concerning just compensation. Government Brief at 28. The government has not cited an instance in which an appellate court has invoked such a procedure. The cases and the statutory provision cited by the government do not stand for the proposition that an appellate court itself will take evidence in reviewing administrative action, but for the very different proposition that an inadequate administrative record may be supplemented by a remand to the agency, or in unusual circumstances to a district court, for further fact-finding. The unconstitutional limitation on compensation for a taking imposed by the Pole Attachment Act's formula cannot be cured by forcing utilities to litigate every pole attachment rate case in a constitutionally deficient proceeding before the FCC, governed by the formula, and then to hope to persuade an appellate court to order the FCC or a district court to conduct a proper inquiry into the amount of just compensation, contrary to the language and intent of the statute, which would then be subject to further appellate review. An unconstitutional statute is not properly preserved by the judicial addition of elements not stated, intended, or envisioned by the legislature. *See United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952) (the judicial function is to apply statutes on the basis of what Congress has written, not what Congress might have written); *accord 62 Cases, Etc., of Jam v. United States*, 340 U.S. 593, 596 (1951) (Congress expresses its purpose by words. It is for the courts to ascertain—not to add nor to subtract, not to delete nor to distort).

application of the statutory formula in the Act. *See* 47 C.F.R. § 1.407 (1985). This statutory formula (*see supra* at 6 & n.11) does not even purport to establish just compensation for a taking of private property; it merely constitutes the Congressional prescription for "just and reasonable" pole attachment rates. 47 U.S.C. §§ 224(b), (d).

As the administrative record in pole attachment proceedings is limited to the evidence viewed by the FCC as necessary to the application of the Act's statutory formula for "just and reasonable" rates, evidence of other factors which may be relevant to the determination of just compensation, such as fair market value, does not come before the reviewing court.[30] Appellate review of such a narrowly constricted record fails to permit the judicial inquiry into just compensation mandated by the Constitution.

[30] *See Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984) (fair market value will in most cases be the measure for "just compensation"; other measures used only when fair market value is too difficult to ascertain or its application would work an injustice to owner or public), 467 U.S. at 10 & n.14; *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 126 (1950) (current or fair market value has normally been accepted as a just standard for a rule to determine just compensation); *United States v. Miller*, 317 U.S. 369, 374 (1943) (where property has no current "market," and thus no market value, resort must be had to other data to ascertain its value); *United States v. 320.0 Acres of Land, More or Less*, 605 F.2d 762, 781 (5th Cir. 1979) (fair market value is one standard for determining what compensation is "just" both to the owner whose property is taken and to the public that pays the bill).

CONCLUSION

Tampa Electric Company respectfully submits that the judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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August 1986

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Nos. 85-1658 and 85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeals From The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR APPELLEE FLORIDA POWER CORPORATION

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QUESTIONS PRESENTED

1. Whether a Federal Communications Commission order issued pursuant to the Pole Attachments Act, 47 U.S.C. § 224, authorizing cable television companies to occupy space on Florida Power Corporation's poles at a rate less than one-third the rate specified in existing contracts between the parties, effected a taking of Florida Power's property.

2. Whether the Pole Attachments Act is unconstitutional insofar as it authorizes takings of property and fails to provide for the determination of just compensation required by the fifth amendment to the Constitution.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following parties participated in the proceeding before the Eleventh Circuit: National Cable Television Association, Inc., Cox Cablevision Corporation, Tampa Electric Company, Mississippi Power & Light Company, Alabama Power Company, Arizona Public Service Company, and Acton Corporation.

Florida Power Corporation is a wholly-owned subsidiary of Florida Progress Corporation and is affiliated with the following: Electric Fuels Corp., Talquin Corporation, Hunnicutt Equities, Progress Equities, Inc., and Progress Financial Services, Inc. This listing is included pursuant to Sup. Ct. R. 28.1.

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BRIEF FOR APPELLEE FLORIDA POWER CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-20a)[1] is reported at 772 F.2d 1537. The memorandum opinions

[1] "J.S. App." refers to the appendix to the jurisdictional statement

and orders of the Federal Communications Commission and its Common Carrier Bureau (J.S. App. 21a-28a, 29a-35a, 36a-47a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1985 (J.S. App. 48a-49a), and rehearing was denied on November 12, 1985 (J.S. App. 50a-51a). A notice of appeal was filed on December 10, 1985 (J.S. App. 52a-53a). On January 31, 1986, Justice Powell extended the time for docketing an appeal to and including March 10, 1986, and on March 3, 1986, he further extended that time to and including April 9, 1986. The Jurisdictional Statements were filed on that date. Probable jurisdiction was noted and the cases were consolidated on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The fifth amendment to the Constitution provides in pertinent part "nor shall private property be taken for public use, without just compensation."

2. The text of the Pole Attachments Act, 47 U.S.C. § 224, is set forth at J.S. App. 54a-56a.

STATEMENT

1. Since the advent of cable television in the 1950's, many cable television companies have formed their distribution systems by attaching equipment to pre-existing pole systems owned by telephone companies or electric power

filed by the Federal Communications Commission and the United States of America.

companies.[2] Attachment of cable equipment involves physical installation of cables and amplifiers, attached by screws or nails and by bolts that penetrate the individual poles on which the equipment is mounted. In the past, cable companies have attached their equipment to poles pursuant to contracts negotiated with the pole owners. Those contracts specify an annual space rental rate, as well as reimbursement to the utility for costs associated with preparing the pole for attachment of the cable equipment.

In 1963 appellant Cox Cablevision Corp., d/b/a Highlands Cable TV ("Cox"), entered into a contract with appellee Florida Power Corporation ("Florida Power") under which Florida Power agreed to allow Cox to attach its equipment to Florida Power's poles at an annual rental rate of $5.50 per pole.[3] In 1977 and 1980, respectively, Teleprompter Corporation and Teleprompter Southeast, Inc. ("Teleprompter"), the predecessors in interest to appellant Group W Cable, and appellant Acton CATV, Inc., d/b/a Brookville Properties Venture and PASCO Associates Venture ("Acton"), entered into similar contracts with Florida Power. Teleprompter agreed to pay annual rental rates ranging from $5.50 to $6.79 per pole, while Acton agreed to pay an annual rental rate of $7.15 per pole.[4]

[2] Attachments to utility poles do not represent the only method for distributing cable television signals. For example, cable facilities may be placed underground. See *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S. Ct. 2034, 2036 (1986). However, cable companies generally consider pole attachments to be the most economical approach.

[3] The Cox contract provided for a term of at least one year and was thereafter to be terminable at will by either party on six months' notice. Joint Appendix (hereafter "J.A.") 223. The rate of $5.50 per pole continued in effect until 1978, when Florida Power proposed a rate of $6.86. Upon the failure of the parties to reach agreement on a new rate, Florida Power invoked a contractual provision authorizing a higher rate under such circumstances. However, Cox continued to pay at the rate of $5.50. J.S. App. 7a.

[4] The contract between Teleprompter and Florida Power specified an

For many years cable operators sought federal intervention in private contractual pole attachment arrangements. In 1978 Congress passed the Pole Attachments Act, 47 U.S.C. § 224 (the "Act"). In the Act, Congress authorized the Federal Communications Commission ("FCC" or "Commission") to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). Congress defined a "just and reasonable" rate as one that "assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole." 47 U.S.C. § 224(d)(1). Congress instructed the Commission to "adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions [for pole attachments]." 47 U.S.C. § 224(b)(1). To aid in implementing this scheme, Congress granted the Commission the power to issue cease and desist orders. 47 U.S.C. § 224(b)(1). The Commission has jurisdiction unless a state regulates rates, terms and conditions for pole attachments and provides the Commission with a certification to that effect. 47 U.S.C. § 224(c).

The Commission's rules promulgated pursuant to the Act provide, *inter alia*, that cable companies may be charged no more than one-thirteenth of the proven costs

annual rate of $5.50 per pole for the year 1977, with annual increases that brought the rate level to $6.24 for the year 1980, $6.51 for the year 1981, and $6.79 for the year 1982. The Teleprompter contract was entered into on July 1, 1977, and extended for a period of five-and-one-half years. J.A. 18, 30-31. The Acton contracts extended for a period of one year. *Id.* at 117, 146-47. These contracts continued in effect after the initial period and provided for termination by either party on six months' notice. *Id.* at 31, 117, 146-47.

of owning and maintaining the utility poles to which their equipment is attached. *Second Report and Order in CC Docket 78-144*, 72 F.C.C.2d 59, 69-71 (1979). The Commission has concluded that Congress intended the Act to be interpreted in such a way as to promote the economic growth of the cable industry. *Id.* at 74.

2. In November 1980, appellant Teleprompter filed a complaint against Florida Power with the Common Carrier Bureau of the Commission. Citing the Pole Attachments Act, Teleprompter sought to be relieved of the annual rental rates to which it had agreed in 1977. Teleprompter requested that in place of the annual rates of over $6.00 per pole specified in its existing contract with Florida Power the Commission order that a maximum rate of $2.23 per pole be inserted into the contract. In April 1981, Acton filed a similar complaint with the Common Carrier Bureau, seeking to be relieved of the annual rental rate of $7.15 per pole it had agreed to in its 1980 contract with Florida Power. Acton requested that a rate of $2.21 be inserted into the contract. In response to these complaints Florida Power contended, *inter alia*, that a grant of the relief requested by the cable companies would effect a taking of private property without just compensation, in violation of the fifth amendment to the United States Constitution.[5]

In July 1981, the Commission's Common Carrier Bureau issued a Memorandum Opinion and Order in response to the Teleprompter and Acton complaints. J.S. App. 36a-47a. The Bureau concluded that $1.79 per pole attachment

[5] Florida Power also challenged certain factual allegations contained in the complaints, the cost formula relied on by the cable companies, the unreasonableness of the low rates requested by the cable companies, and retroactive application of the Act's provisions to the Teleprompter contract, which had been in existence prior to passage of the Act. In its responses Florida Power argued that either the existing annual rental rates or higher rates of approximately $10 per pole would be fair and just. See J.A. 82, 184.

per year (*i.e.*, \$.42 lower than the rate requested by Acton and \$.44 lower than the rate requested by Teleprompter) was the maximum just and reasonable rate Florida Power could charge under the Pole Attachments Act and that Florida Power must refund all excess payments from the date of the filing of the complaints, plus interest.[6] The Bureau terminated the existing rates and ordered that an annual rate of \$1.79 for each pole attachment be substituted in the contracts. The Bureau made no mention of Florida Power's constitutional challenge based on the just compensation clause.

In November 1981, Cox filed a complaint against Florida Power with the Common Carrier Bureau. Relying on the Bureau's Teleprompter-Acton order, Cox requested that the Bureau reduce to \$1.79 the annual rental rate it could be charged pursuant to its contract with Florida Power. In March 1982, the Bureau issued a Memorandum Opinion and Order granting Cox's request. J.S. App. 29a-35a. The Bureau again ordered that the rate prescribed by the contract be terminated and that an annual rate of \$1.79 for each pole attachment be substituted. As in the Teleprompter-Acton case, the Bureau failed to address the constitutional arguments raised in Florida Power's response.[7]

Florida Power sought Commission review of the Bureau's Teleprompter-Acton and Cox orders. In September

[6] The Common Carrier Bureau disallowed the majority of the maintenance and administrative expenses documented by Florida Power. It also permitted recovery of less than one-third of Florida Power's tax expenses.

[7] Florida Power presented other challenges to the Cox complaint, including objections to the methodology used to calculate the new rate and to retroactive application of the Act to a preexisting contract. Florida Power took the position that the rates that had been negotiated and that were being charged under the Cox contract were just and fair and that a higher rate of roughly \$17 per pole also would be fair and just since this was the annual pole cost Cox would incur if it owned an already-constructed pole system. J.A. 252.

1984, the Commission issued a single order denying Florida Power's applications for review. J.S. App. 21a-28a. The Commission rejected Florida Power's constitutional arguments on the ground, *inter alia*, that, in the Commission's view, a Commission-ordered abrogation of a contractual pole attachment rate did not constitute the sort of physical occupation without compensation that had been held to constitute a taking in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

3. Florida Power filed a petition for review of the Commission's order in the United States Court of Appeals for the Eleventh Circuit. The court of appeals held in a *per curiam* opinion that the Commission's order must be vacated. J.S. App. 1a-20a. The court concluded that the Commission had authorized a permanent physical occupation of Florida Power's private property. Therefore, under the Supreme Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra*, the Commission's order effected a taking for which just compensation was due under the fifth amendment.

In reaching its conclusion, the court of appeals held that cable company access to Florida Power's property had been authorized by the government and was in no legitimate sense "invited" by Florida Power. Assuming that Florida Power had initially "invited" the cable companies' access to its poles by dedicating pole space to television cables and entering into written agreements with cable companies, it was "nonetheless clear that that invitation was made subject to and based upon certain conditions, namely the agreed upon annual per pole rate. . . .While [the cable companies] may have been invited at the outset, they certainly weren't invited at the rate imposed by the FCC." J.S. App. 10a-11a.

The court of appeals concluded also that the occupation of Florida Power's property authorized by the Commission was permanent. The court noted that under the Commis-

sion's stated policy, Florida Power would not be free to refuse to renew its agreements with the cable companies. Indeed, the court observed that "the FCC has made it quite clear that it intends to require continued provision of space at FCC-ordered rates." J.S. App. 12a. In any event, the reduced rates had been inserted into Florida Power's contracts with the cable companies, and so "at the very least" Florida Power would have to suffer the cable companies' presence on its property for the duration of those contracts. *Id.* at 13a.

Finally, the court of appeals held that the Commission had clearly authorized a physical occupation of Florida Power's property: "[i]n regard to the physical attachment then, *Loretto* and the instant case are virtually indistinguishable; they both involve the placement of plates, boxes, wires, bolts and screws upon the property of a reluctant owner." J.S. App. 14a.

Having concluded that the Commission order effected a taking of Florida Power's property, the court of appeals turned to the question whether just compensation for the taking could properly be determined by the Commission pursuant to the formula prescribed by Congress. Relying on the separation of powers principles enunciated in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), and applied in several more recent cases, the court held that by authorizing the Commission to make determinations of the compensation to be provided to pole owners pursuant to the binding formula set forth in the Pole Attachments Act, Congress precluded any true just compensation determination. In limiting "just and reasonable" rates to an amount determined by application of the statutory formula Congress had impinged on the exclusive province of the judiciary by impermissibly restricting the range of compensation that could be awarded for a Commission-ordered taking.

The court of appeals denied petitions for rehearing filed by the Commission and the cable company intervenors, with no member of the court voting in favor of rehearing en banc. J.S. App. 50a-51a.

SUMMARY OF ARGUMENT

The fifth amendment to the Constitution provides that private property may not be taken without just compensation. In a long line of precedent, reaffirmed in the recent case of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court has set forth the traditional rule that a permanent physical occupation of property is, without more, a taking within the meaning of the fifth amendment.

The Commission's order applying the Pole Attachments Act to Florida Power fits squarely within the *per se* rule set forth in *Loretto*. By the order, the government authorizes a direct physical invasion of Florida Power's property by a third party that is continuing in nature and extends for an indefinite period of time. As in *Loretto*, the proper conclusion is that the order has effected a taking for which the property owner is entitled to just compensation.

The Pole Attachments Act impermissibly interferes with Florida Power's right to have a constitutionally adequate determination of just compensation. Under the Act, the Commission is bound to impose rental rates pursuant to a formula set by Congress. The formula limits the agency to a calculation based on certain costs, and it involves no consideration of the traditional measure of just compensation—fair market value. The opportunity for judicial review of Commission orders does not correct this deficiency. Because of the limitations imposed on the Commission by the statute, the reviewing court lacks a factual basis for determining whether the rental rate set by the

Commission satisfies constitutional standards for just compensation.

Thus, the Pole Attachments Act effects a taking and fails to provide for a proper determination of just compensation. Accordingly, the court of appeals properly concluded that the Pole Attachments Act is inconsistent with the dictates of the fifth amendment and that it is therefore unconstitutional and invalid.

ARGUMENT

The Federal Communications Commission, acting pursuant to the Pole Attachments Act, in this case authorized cable television companies to occupy space on Florida Power Corporation's poles at rates less than one-third those specified in existing contracts. The court of appeals correctly concluded that the Commission's order amounted to a taking of Florida Power's private property and that that taking was unaccompanied by the determination of just compensation that is required by the fifth amendment to the Constitution.

I. The Commission's Order Pursuant To The Pole Attachments Act Constituted A Taking Of Florida Power's Private Property Within The Meaning Of The Fifth Amendment To The United States Constitution.

The fifth amendment to the United States Constitution provides in pertinent part that private property shall not be taken for public use without the payment of just compensation. U.S. Const. amend. V. The threshold question in this case is whether the action of the Federal Communications Commission pursuant to the Pole Attachments Act authorizing cable companies to occupy space on Florida Power's poles at a rate far lower than that specified in existing contracts amounted to a taking of Florida Power's private property. See, *e.g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 106 S. Ct. 2561, 2566 (1986); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 122

(1978). Because the Commission order authorized a permanent physical occupation of Florida Power's property, it effected a taking within the meaning of the fifth amendment.

A. Application of This Court's Decision in *Loretto v. Teleprompter Manhattan CATV Corp.* Mandates the Conclusion that the Commission's Order Effected a Taking of Florida Power's Private Property.

In concluding that the Commission's order effected a taking of Florida Power's private property, the court of appeals relied on this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto* the Court held that application of a New York statute that prevented landlords from interfering with the installation of cable television equipment on their rental property and that limited the amount that the cable company could be required to pay to the landlord effected a taking of the landlords' property within the meaning of the fifth amendment as made applicable to the states by the fourteenth amendment. The Commission's order applying the Pole Attachments Act to require that Florida Power permit cable companies to maintain their equipment on Florida Power's poles at rates calculated pursuant to a formula set out in the Act accomplishes virtually the same result as application of the New York statute considered in *Loretto*. The Court's decision in that case, therefore, mandates the conclusion that there was a taking of Florida Power's property here.

The statute at issue in *Loretto* provided that a landlord was required to permit a cable television company to install its facilities on his property and could not demand payment from the company in excess of an amount determined by a state commission to be reasonable. Prior to the 1973 passage of the statute, Loretto's predecessor had granted Teleprompter, a cable company, permission to install cables on the roof of Loretto's building. After she purchased the

building, Loretto discovered the equipment. She subsequently brought a class action against Teleprompter on behalf of all owners of real property in New York State on which Teleprompter had placed cable components, alleging that the installation was a trespass and, to the extent it relied on the New York statute, a taking without just compensation. The New York Court of Appeals held that application of the statute did not constitute a taking of Loretto's property. 458 U.S. at 421-25.

This Court reversed, holding that the New York statute effected a taking of Loretto's property for which she was entitled to receive just compensation under the fifth and fourteenth amendments. The Court concluded that the statute authorized a permanent physical occupation of real property and that the cable installation therefore constituted a taking under the traditional physical occupation test. That test, which is based on a long line of this Court's decisions, distinguishes between a permanent physical occupation, which always amounts to a taking, and a physical invasion short of an occupation or a mere restriction on the use of property, which may or may not constitute a taking depending on the outcome of an ad hoc inquiry. 458 U.S. at 427-35. The Court concluded that the traditional physical occupation test retained force in view of the seriousness of the invasion of property interests normally resulting from a permanent physical occupation and in view of the evidentiary benefits afforded by the rule. *Id.* at 435-38.

The Court noted that the cable installation on Loretto's building involved direct physical attachment of plates, wires, bolts, and screws to the building, and that the physical occupation was permanent, rather than "temporary" or "intermittent." 458 U.S. at 438-39. The Court found it irrelevant that Loretto could escape the statutory requirements by ceasing to rent her building to tenants. *Id.* at 439 n.17.

The Court recognized that the New York statute had been found to serve a legitimate public purpose. It held, however, that a permanent physical occupation of property authorized by government constitutes a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 458 U.S. at 434-35. The Court rejected the contention that the statute was simply a permissible regulation of the use of real property since it applied only to buildings used as rental property. The Court "fail[ed] to see . . . why a physical occupation of one type of property but not another type is any less a physical occupation." *Id.* at 438-39. In response to the observation that the cable installation occupied only a small area on the roof of Loretto's building, the Court explained that the existence of a taking did not depend on the volume of space occupied by the cable installation. *Id.* at 438 n.16. The Court remanded to the state court for a determination of the amount of compensation due for the taking. *Id.* at 441-42.

The holding in *Loretto* applies with full force to this case.[8] As in *Loretto*, the physical occupation is by a third party, the cable company that owns the equipment. The installations on Florida Power's poles are similar to the installation on Loretto's building. Indeed, the court of appeals found that with respect to the physical attachment "*Loretto* and the instant case are virtually indistinguishable; they both involve the placement of plates, boxes,

[8] In its final order, the Commission suggested that this case is distinguishable from *Loretto* because the latter involved a physical occupation "without any compensation." J.S. App. 28a. In fact, the statute at issue in *Loretto* authorized the State Commission on Cable Television to determine a "reasonable" amount that could be charged to cable companies—a measure that could exceed a nominal sum if the landlord could make the appropriate showing. In any event, the adequacy of the compensation provided for by the Pole Attachments Act is a separate question from the issue of whether a taking has occurred.

wires, bolts and screws upon the property of a reluctant owner." J.S. App. 14a.[9]

Here, as in *Loretto*, the presence of the cable installation on private property is authorized by government action. In *Loretto*, the original installation of the cable equipment occurred pursuant to an agreement between the cable company and the building's previous owner, prior to the passage of the statute at issue. 458 U.S. at 421-23; *id.* at 443 (Blackmun, J., dissenting). Passage of the statute and its application to Loretto's building constituted government action that effected a taking of Loretto's property. The Court did not in any way suggest that the force of Loretto's taking claim was diminished by her predecessor's initial invitation to the cable companies or by Loretto's sufferance of the cable equipment during the five years between her purchase of the building and the time she brought suit.

In this case, the passage of the Pole Attachments Act and the Commission's order authorizing the cable installations at a lower rental rate effected the taking of Florida Power's property. The court of appeals correctly concluded that the fact that the cable equipment originally

[9] The amount of space occupied by the cable equipment is quite significant when one considers cumulatively all of the poles to which a cable company's equipment is attached. Other cable companies could seek to occupy space on Florida Power's poles in the future. See, *e.g.*, *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986); *Loretto*, 458 U.S. at 437. In any event, the Court made clear in *Loretto* that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436-37 (footnote omitted). See also *id.* at 426.

The cable companies attempt to minimize the importance of the physical intrusion by referring to the pole space they occupy as "surplus." However, the landlord in *Loretto* explicitly acknowledged that she had no alternative uses for the space on her roof that was occupied by the cable installation. See 458 U.S. at 453-54 (Blackmun, J., dissenting). The Court apparently viewed that admission as irrelevant.

was installed on Florida Power's poles pursuant to voluntary agreements between Florida Power and the cable companies did not affect the conclusion that the Commission's action had effected a taking of Florida Power's property. As the Court noted, the original invitation to the cable companies to install their equipment on Florida Power's poles was subject to certain conditions, including the negotiated annual rental rates. J.S. App. 10a. The Commission's order drastically reduced the annual rental rates Florida Power can charge under the contracts, to a level less than one-third the rate Florida Power had accepted voluntarily. The substitution of a new rate worked a fundamental change in the terms under which the physical occupations take place, with the result that the occupations have been converted from an arrangement that is voluntary to one imposed by government action.[10]

The government contends that this case differs from *Loretto* in that, while the New York statute explicitly prohibited interference with cable installation, neither the Pole Attachments Act nor the Commission order on its face requires that cable companies be granted access to utility poles. Brief for Federal Appellants ("Gov't Br."), pp. 14-18. For this reason, according to the government, the physical occupation in this case cannot be regarded as interfering with Florida Power's property rights. The gov-

[10] To present an extreme case, an occupation could hardly be said to be consensual if the original rental rate negotiated by the parties had been $1 million per year, but subsequent government action imposed a ceiling of $1 per year.

Similar principles apply in the common law of trespass. A person who enters upon property with limited authorization and subsequently exceeds the limitations placed on the entry is no less a trespasser than one who enters upon the property with no authorization. See *Restatement (Second) of Torts* § 168 (1965); *Sabo* v. *Reading Co.*, 244 F.2d 692, 694 (3d Cir.), *cert. denied*, 355 U.S. 847 (1957); *Burton Constr. & Shipbldg. Co.* v. *Broussard*, 154 Tex. 50, 58-59, 273 S.W.2d 598, 603 (1954).

ernment apparently seeks to create the inference that it may be within Florida Power's power to withdraw from its agreements with the cable companies, thereby freeing itself from any unwanted physical intrusions on its poles.

In reality, the Commission's order accomplishes far more than the government suggests. When considered in context with the legislative history of the Pole Attachments Act and with other Commission actions, the order amounts to a requirement that Florida Power continue to permit the cable companies to occupy space on its poles and that it do so at the much lower rental rate imposed by the Commission.[11] In its report accompanying the pole attachments legislation, the Senate committee recognized the possibility that a utility might discontinue provision of pole attachment space to a cable company in order to avoid Commission regulation. The committee expressed the view that under the Act "the Commission could determine that such conduct would constitute an unjust or unreasonable practice and take appropriate action upon a finding that [cable television] pole attachment rights were discontinued solely to avoid jurisdiction." S. Rep. No. 95-580, 95th Cong., 1st Sess. 16 (1977). The Commission has asserted jurisdiction under the Act to require continued provision of pole attachments at Commission-ordered rates. In promulgating rules to implement the Pole Attachments Act, the Commission, citing the Senate report, stated in a discussion of access to utility poles: "Even where there is currently no [cable television] attachment or agreement therefor, the

[11] Even if the Commission did not authorize indefinite occupation by cable companies, the effect of the orders in this case is to authorize occupation for some period of time. Florida Power's contracts with the cable companies incorporate obligations to allow physical occupation during certain time periods. See *supra*, nn.3&4. The Commission's substitution in the contracts of a lower rental rate has the effect of requiring that Florida Power permit occupation by the cable companies on government-imposed terms at least for the remaining lives of the contracts.

Commission has jurisdiction if (1) there is communications space designated on the poles and (2) the utility has discontinued [cable television] attachment in order to avoid such Commission jurisdiction." *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585, 1589 (1978).

The Commission has exercised its claimed jurisdiction to regulate access to utility poles by preventing attempts by utilities to discontinue pole attachments. In cases in which utilities have ordered cable companies to disconnect their equipment the Commission has entered stays to prevent such action.[12] For example, in *Whitney Cablevision* v. *Southern Indiana Gas & Electric Co.*, File No. PA-84-0017, FCC Mimeo No. 841 (Nov. 16, 1984), the utility ordered the cable company to remove its equipment because of unauthorized and unsafe attachments that breached the parties' agreement. The Commission issued a stay based on its belief that it was reasonably likely that the cable company could show that the attempted termination was motivated by the utility's desire to avoid pole attachment rate regulation. In *Tele-Communications, Inc.* v. *South Carolina Electric & Gas Co.*, File No. PA-83-0027, FCC Mimeo No. 3994 (April 19, 1985), the Commission issued a final order preventing a utility from terminating a pole attachment agreement, despite the utility's citation of numerous safety violations and unauthorized attachments by the cable operator and despite the utility's provision of six

[12] Cable companies have sought Commission intervention to prevent termination of pole attachment arrangements pursuant to Commission Rule 1.1403. Subsection (a) of the rule states that "[a] utility shall provide a cable television system operator no less than 60 days written notice prior to (1) removal of facilities or termination of any service to those facilities, such as removal or termination arising out of a rate, term or condition of a cable television pole attachment agreement. . . ." 47 C.F.R. § 1.1403(a) (1985). Upon receipt of such a notice, a cable television company may seek a "temporary stay" of the removal pursuant to subsection (b) of the rule. 47 C.F.R. § 1.1403(b) (1985).

months' notice of termination. See also *Bailey* v. *Mississippi Power & Light Co.*, File No. PA-83-0026, FCC Mimeo No. 36118 (Sept. 11, 1985) (mandating access to poles by a second cable company where the utility had declined to contract with the cable company for reasons including safety, manpower limitations and other economic considerations.)[13]

It is clear from the Commission's past statements and actions that it would not permit Florida Power to terminate its pole attachment arrangements with the cable companies in order to free itself from a physical occupation at an unacceptably low rental rate, a fact conceded by the cable companies in their brief. Brief for Appellants Group W Cable, Inc., National Cable Television Ass'n, Inc., and Cox Cablevision Corp. (hereafter "Cable Companies' Br." or "CC Br."), p. 26. The Commission views such contract terminations as "retaliatory" and as attempts to evade the Commission's jurisdiction that would justify an order preventing termination. As the court below recognized, "[t]he hard reality of the matter is that if Florida Power desires to exclude the cable companies, for whatever reason, they are powerless to do so." J.S. App. 11a.[14]

The government nevertheless implies that the Commission might respond differently to an attempt by Florida Power to exclude the cable companies than it has in past cases involving other companies. It fails to explain, how-

[13] For the Court's convenience we are lodging copies of the three Commission decisions referred to above with the Clerk of the Court.

[14] Appellants point to the fact that Florida Power entered into a contract with Acton and failed to terminate its contracts with Cox and Teleprompter after the effective date of the Pole Attachments Act. The cable companies had committed to pay Florida Power rental rates that were determined through negotiation by the parties. Acceptance of those arrangements should in no way be regarded as a waiver of Florida Power's right to claim just compensation in connection with the Commission's subsequent imposition of a radically lower rate.

ever, why the Commission would reach a different result, noting only (Gov't Br., pp. 16-17) that the Commission has not attempted to define the limits of a utility's power to exclude a cable company on the ground that the new rental rate imposed by the Commission is unacceptable. As the court of appeals noted, it is difficult to imagine "how Florida Power, or any utility for that matter, could issue a disconnect order under such circumstances and have it escape being deemed retaliatory by the FCC." J.S. App. 12a n.4. In view of the Commission's past statements and actions, its orders in this case must be regarded as encompassing a requirement that Florida Power continue to permit physical occupation of its poles at the rate ordered by the Commission, for an indefinite period.[15]

[15] Florida Power's taking claim is therefore ripe for review, contrary to the government's suggestion in its brief (p. 16 n.20). In response to complaints filed by the cable companies, the Commission has issued a final order determining a specific maximum rate that Florida Power may charge the cable companies. There is no reason to require Florida Power to engage in a futile attempt to exclude the cable companies as a prerequisite to obtaining resolution of its constitutional objections to the order. We note that the Court in *Loretto* decided the takings claim even though the record indicated that Loretto had never sought to have the cable equipment removed from her building. See 458 U.S. at 443 n.2 (Blackmun, J., dissenting).

This case differs from recent cases in which this Court has held that takings claims were not ripe for review. In *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), the appellants challenged the mere enactment of zoning ordinances before it was clear how those ordinances would be applied. In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S. Ct. 3108 (1985), the developer had failed to seek variances from a development plan or to take advantage of a state compensation procedure. And in *MacDonald, Sommer & Frates* v. *Yolo County*, *supra*, the county planning commission had not finally determined how it would apply regulations to the property in question. Here, the relevant governmental body has made a final determination of the rental rate Florida Power will be permitted to charge and has made it clear through other statements that physical occupation of Florida Power's poles by the cable companies must be permitted indefinitely.

Contrary to appellants' contentions, there can be no question that the physical occupation ordered by the Commission is permanent. By its very nature, the attachment of cable equipment to utility poles by wires, bolts, and screws is not a "temporary" or "intermittent" occupation (compare *Loretto*, 458 U.S. at 438-39). It is a direct and continuing invasion of Florida Power's property. Moreover, as we explained above, the Commission's order in effect requires Florida Power to permit physical occupation on terms imposed by the Commission for the duration of the contracts and for an indefinite period thereafter. The court of appeals correctly concluded that "the extent of the occupation in the case of Florida Power not only satisfies *Loretto*'s permanency requirement, but significantly exceeds it." J.S. App. 13a.

The cable company appellants appear to assume that their physical occupation of Florida Power's poles will continue indefinitely. Nevertheless, they suggest that the physical occupation of Florida Power's poles by the cable equipment should not be regarded as permanent because under the terms of the contracts Florida Power may some day order removal of the cable equipment if it needs the space for its own utility-related purposes. But even then, as the cable companies recognize, it is uncertain whether removal would ever occur, since the Commission might simply order that the cable companies provide larger poles. See CC Br., p. 25 n.58. Moreover, the mere possibility that the Commission might at some point allow Florida Power to end the physical occupation of its poles under limited circumstances is not sufficient to render the occupation non-permanent. This Court in *Loretto* rejected Teleprompter's contention that there could be no taking in that case because Loretto might choose at some point to cease using her building for rental purposes and would then be free to insist that the cable company remove its equipment. 458 U.S. at 439 n.17. Here, too, there is a

taking despite the possibility that circumstances might some day permit termination of the physical occupation.

B. The Holding of *Loretto* Applies with Full Force to a Permanent Physical Occupation of the Private Property of a Regulated Utility.

Appellants, who presumably recognize the close parallel between the facts here and those of *Loretto*, have sought some way to distinguish the two cases. However, the purported distinction on which they have chosen to rely—that Florida Power is a regulated utility, while Loretto was not—is not a basis for treating this case differently from *Loretto*.[16]

Nothing in *Loretto* itself suggests that the Court's holding is inapplicable to physical occupation of property owned by a highly regulated entity. Loretto was engaged in renting apartments and (as the Court expressly recognized) was therefore subject to various forms of regulation, including rent control, building codes, and requirements concerning utility connections and mailboxes. See 458 U.S. at 440. The Court rejected the contention that requiring Loretto to permit cable installations on her building at a mandated rate was merely a permissible regulation of the use of real property, as opposed to a taking. According to the Court, attachment of cable equipment to rental property was unquestionably a physical occupation and therefore satisfied the traditional rule; the type of property occupied should not affect the analysis. *Id.* at 439. The Court clearly did not view Loretto's interest in receiving just compensation as diminished by the business nature of her property

[16] The cable industry's argument on this point rings hollow in light of Teleprompter's argument in *Loretto* that Loretto could not claim the protection of the fifth amendment because as a landlord she was subject to extensive regulation. Here, Teleprompter (now known as Group W) and the other members of the cable industry are contending that this case is not governed by *Loretto* because that case did not involve property of a highly regulated entity.

or by the fact that she was subject to various forms of regulation.

There can be no dispute that the protection of the just compensation clause extends to property owned by a public utility.[17] This Court has so held on a number of occasions. For example, in *Western Union Telegraph Co.* v. *Pennsylvania Railroad*, 195 U.S. 540 (1904), the Pennsylvania Railroad requested that Western Union remove its poles and lines from the railroad right of way so that the railroad could rent the same space to another telegraph company. Western Union objected, arguing that the right of way had become a "public highway" and was therefore subject to public uses. While the Court acknowledged that a railroad right of way constituted "property devoted to a public use," it went on to explain that such a right of way "is so far private property as to be entitled to that provision of the Constitution which forbids its taking, except under the power of eminent domain and upon payment of compensation." *Id.* at 573.[18] State courts have

[17] This Court recently rejected a claim that the constitutional protection afforded to utilities should be narrower than that available to other entities. In *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n*, 106 S. Ct. 903 (1986), the California Public Utilities Commission had issued an order requiring Pacific Gas & Electric to carry third parties' messages in the unused space in its billing envelopes. The CPUC argued that because PG&E was a regulated utility it had a lesser right to freedom from state regulation of its speech than other entities and that it lacked a full constitutionally protected property interest in the unused space in its billing envelopes. *Id.* at 912. The Court noted that it had rejected the former notion in *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980), and that the latter argument "misperceives . . . the relevant property rights." 106 S. Ct. at 912.

[18] See also, *e.g.*, *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 627 (1961) (compensation due for taking of flowage easement owned by utility company); *ICC* v. *Oregon-Washington R.R. & Navigation Co.*, 288 U.S. 14, 40-41 (1933) ("[t]he railroads, though dedicated to a public use, remain the private property of their owners, and their

likewise stressed the "principle that the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property. Neither the property nor its use can be taken for a compulsory price which falls below the measure of fair and just compensation." *Alabama Power Co.* v. *Alabama Public Service Commission*, 422 So. 2d 767, 769 (Ala. 1982) (quoting *Alabama Public Service Commission* v. *Southern Bell Telephone & Telegraph Co.*, 253 Ala. 1, 12, 42 So. 2d 655, 663 (1949)). See also, *e.g.*, *Kansas City Power & Light Co.* v. *State Corp. Commission*, 238 Kan. 842, 847, 715 P.2d 19, 24 (1986) ("A utility company has the same rights under the taking clause as other private entities.") Thus, the fact that an entity like Florida Power enjoys the rights granted to a public utility and bears the responsibility of providing service to the public does not affect the conclusion that any taking of its property must be accompanied by the payment of just compensation.

Appellants make much of the fact that some utility regulation entails a governmentally-imposed requirement that utilities make physical interconnections with their customers. Whatever may be the proper constitutional analysis in such physical interconnection cases, they are not analogous to this case. Physical interconnection requirements involve the services a company is obliged to provide by virtue of its status as a public utility. Thus, the duty of an electric utility to provide electricity to the public in a safe, efficient, and nondiscriminatory manner might provide the basis for requiring it to make a physical connection with another company. See 2 Nichols, *The Law of Eminent Domain* § 5.08, at 5-163 (rev. 3d ed. 1985). But such a principle would not extend to other physical intrusions that are unrelated to the utility's obligation to provide electricity.

assets may not be taken without just compensation"); *Missouri Pac. Ry.* v. *Nebraska*, 217 U.S. 196, 206, 208 (1910) (requirement that railroad construct switch connections constituted a taking).

The law is clear that public utilities may not be required without just compensation to provide additional services, above and beyond those they are committed to provide by virtue of their public utility status. Imposition on a public utility of "burdens that are not incident to its engagement" (*Northern Pacific Railway* v. *North Dakota*, 236 U.S. 585, 595 (1915)) may amount to a taking of property for public use without just compensation. *E.g.*, *Delaware, Lackawanna & Western Railroad* v. *Town of Morristown*, 276 U.S. 182, 193-95 (1928) (regulation requiring railroad to provide space on its ground for private taxicabs effected a taking for which compensation was due); *Pacific Telephone & Telegraph Co.* v. *Eshleman*, 166 Cal. 640, 677-687, 137 P. 1119, 1133-37 (1913) (order requiring physical connection outside dedicated use was a taking without just compensation); *Georgia Power Co.* v. *Georgia Public Service Commission*, 211 Ga. 223, 227, 85 S.E.2d 14, 18 (1954) (requirement that public utility devote its property to service it had never professed to render is equivalent to taking property for public use without just compensation); *Nicoma Park Telephone Co.* v. *State*, 198 Okla. 441, 444-45, 180 P.2d 626, 629-30 (1947) (order requiring extension of service constituted a taking); see also *Great Northern Railway* v. *Minnesota*, 238 U.S. 340, 345-47 (1915) (order requiring installation of scales extended beyond the scope of the railroad's duty and constituted a taking.

It is equally clear that the pole attachments scheme does not involve services provided by Florida Power in its public utility capacity, but only its non-utility role as a renter of space on its property. Numerous state courts and utility commissions addressing this issue have ruled that the renting of space on utility poles to cable television companies is not a public utility service. *E.g.*, *Re Southern Bell Telephone & Telegraph Co.*, 65 Pub. Util. Rep. 3d (P.U.R.) 117, 120-21 (Fla. Pub. Serv. Comm'n 1966) (". . . This [rental of pole space] involves the right of a public utility to control the use of its own property by others when that use

is for others' profit and does not involve the public duties of the utility."); *Illinois-Indiana Cable Television Association* v. *Public Service Commission*, 427 N.E.2d 1100, 1109 (Ind. App. 1981) ("[t]he employment of utility poles in the suspension of coaxial cables for the transmission of television signals is not a use devoted to the purposes in which electric and telephone utilities are engaged.")[19]

Florida Power made no commitment to provide space on its poles as a quid pro quo for achieving public utility status. Moreover, the cable companies cannot be regarded as consumers of traditional utility services when they rent space on the poles. Pole attachment arrangements constitute normal commercial relationships between two businesses, one of which seeks to rent space from the other, as opposed to the special relationship traditionally thought to exist between an electric utility and its electric power customers.[20]

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[19] Accord *Snohomish County Pub. Util. Dist.* v. *Broadview Television Co.*, 91 Wn. 2d 3, 9-10, 586 P.2d 851, 855-56 (1978); *Ceracche Tel. Corp.* v. *Public Serv. Comm'n*, 49 Misc. 2d 554, 557, 267 N.Y.S.2d 969, 973 (Sup. Ct. 1960); *International Cable T.V. Corp.* v. *All Metal Fabricators, Inc.*, 66 Pub. Util. Rep. 3d (P.U.R.) 446, 462 (Cal. Pub. Util. Comm'n 1966); *WCOG, Inc.* v. *Southern Bell Tel. & Tel. Co.*, 64 Pub. Util. Rep. 3d (P.U.R.) 314, 316-17, (N.C. Util. Comm'n 1966); but see *Re Cable Television Pole Attachments*, 49 Pub. Util. Rep. 4th (P.U.R.) 128 (Ky. Pub. Serv. Comm'n 1982).

[20] Amici err in suggesting (*e.g.* Nor-West Cable Br., pp 8-10) that by renting pole space to cable companies in the past utilities have "dedicated" their poles to the cable equipment, thereby voluntarily committing themselves to continue to allow the poles to be used for that purpose. A utility's voluntary negotiation of an ordinary rental contract at market rates does not commit the utility to rent the same space forever at rates drastically lower than those originally negotiated. See *International Cable T.V. Corp.* v. *All Metal Fabricators, Inc.*, *supra*:

> [The utility's] willingness, as pertinent to the present controversy, to enter into temporary individual license agreements with CATV operators for use by the latter of vacant space on its poles is neither an offer nor a providing of "public utility service," since

Several state courts have expressly concluded that space on utility poles constitutes private property that may not be taken by means of physical attachments without the payment of just compensation. In *New York Telephone Co.* v. *Town of North Hempstead*, 41 N.Y.2d 691, 395 N.Y.S.2d 143, 363 N.E.2d 694 (1977), the town claimed the right in the exercise of its police power to attach street lighting equipment to the plaintiff's utility poles. The New York Court of Appeals held that the town was actually seeking to appropriate a portion of the poles and that the case presented "a clear instance of a taking of private property for the use of the municipality." 41 N.Y.2d at 697, 395 N.Y.S.2d at 147, 363 N.E.2d at 697. Similarly, in *Burlington Light & Power Co.* v. *City of Burlington*, 93 Vt. 27, 33-34, 106 A. 513, 516 (1918), the court stated that an ordinance granting the city the right to use the top gain of existing utility poles to attach its own electric wires would amount to a taking of property without compensation. See also *State ex rel. Wisconsin Telephone Co.* v. *City of Sheboygan*, 111 Wis. 23, 40-41, 86 N.W. 657, 662 (1901) (city's claim of right to use top of telephone company's poles for fire alarm system did not come within its police power).

In sum, Florida Power's status as a public utility in no way undermines the conclusion that the Commission's order pursuant to the Pole Attachments Act effected a taking of Florida Power's private property. The state cases involving attachments to utility poles confirm the conclusion that the Commission's order effected a taking of Florida Power's property for which just compensation must be paid.

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the utility does not hold out such contracts impartially to the general public or [sic] does it thereby provide any "service" related to the concept of dedication to the public of a communication service or facility which is the hallmark of a public utility calling.

66 Pub. Util. Rep. 3d (P.U.R.) at 462.

In a variation on their public utility arguments, appellants attempt to avoid the application of the just compensation clause by characterizing the Commission's action pursuant to the Pole Attachments Act as "ratemaking" or "regulation." But Congress has not merely provided for the setting of rates; nor has it simply regulated Florida Power's use of its property. Rather, Congress has authorized a continuing physical intrusion by a third party on Florida Power's property on government-imposed terms that are very different from those voluntarily negotiated by Florida Power. *Loretto* makes it clear that such a physical intrusion constitutes more than mere ratemaking or regulation. The Court there clearly distinguished between rent control and other forms of regulation of the landlord-tenant relationship, on the one hand, and permanent occupation of a landlord's property by a third party at a state-ordered rate, on the other. See 458 U.S. at 439-40. While the former are analyzed under the multifactor inquiry used for nonpossessory governmental activity, the latter on its face constitutes a taking. Thus, even if the government action with respect to pole attachments resembles ratemaking or regulation in some ways, the fact that it entails a permanent physical occupation at the Commission-ordered rate requires that it be classified as a taking.[21]

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[21] The government in its brief (pp. 19-20) cites this Court's summary dismissal in *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983), in support of its contention that this case involves regulation, not a taking. In *Fresh Pond*, the Supreme Judicial Court of Massachusetts had affirmed by an equally divided court, without opinion, the judgment of the lower court that local restrictions on removing apartments from the rental market were constitutional. *Fresh Pond Shopping Center, Inc.* v. *Rent Control Bd.*, 388 Mass. 1051, 446 N.E. 2d 1060, *appeal dismissed sub nom. Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983). The facts of this case, involving continuing physical attachment of cable equipment, are unquestionably closer to *Loretto* than to *Fresh Pond*.

Cable company appellants suggest in their brief (CC Br., p. 23) that attachment of cable equipment to Florida Power's poles can never be a taking because Florida Power is authorized by the state utility commission to charge its utility customers rates sufficient to yield a nonconfiscatory return. Apart from the inherent unfairness of having electricity consumers subsidize consumers of cable television, if that argument were valid, no regulated utility could ever assert a takings claim based on physical occupation of its property because the ability to shift the burden to utility customers would mean that the utility would never suffer any loss.[22] In fact, a utility that must raise its rates to compensate for a loss of income from its nonutility businesses may lose utility customers as a result. Moreover, even if a utility were assured of earning a nonconfiscatory rate of return on its assets this would not amount to payment of just compensation for the loss to the pole owner caused by the physical intrusion of cable equipment. The right to exclude such equipment clearly has substantial value to the pole owner, the loss of which would not be compensated in the utility rate of return.[23]

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[22] A similar argument was rejected by this Court in *Northern Pacific Ry., supra*, 236 U.S. at 598:

> It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If the rates are exorbitant, they may be reduced. Certainly, it would not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action.

[23] Cable equipment may interfere with the pole owner's efforts to maintain and repair the poles. For example, it may be necessary to use a cherry picker to repair poles on which the cable company has placed amplifiers (used to boost cable signals). Moreover, the presence of cable equipment may require the pole owner to obtain the cooperation of the cable company before taking certain actions. Compare *Loretto*, 458 U.S. at 441 n.19. Thus, a pole owner is not indifferent to the presence of cable equipment even if it receives a utility rate of return on its physical investment.

C. Application of the Ad Hoc Inquiry Used for Cases That Do Not Involve A Permanent Physical Occupation Also Leads to the Conclusion That There Has Been A Taking of Florida Power's Property.

The cable company appellants argue in their brief (CC Br., pp. 22-23) that the Commission's order in this case would not be found to constitute a taking under the ad hoc balancing test used in cases that do not involve permanent physical occupation. That argument is beside the point. The traditional rule is that a permanent physical occupation constitutes a taking "without regard to other factors that a court might ordinarily examine." *Loretto*, 458 U.S. at 432. Such a rule is useful precisely because it avoids the need to undertake ad hoc inquiries. Nevertheless, we show below that the Commission's order clearly effects a taking under the ad hoc balancing approach.

This Court has identified three factors as particularly significant in resolving whether government action effects a taking—the economic impact of the action, the extent to which it interferes with investment-backed expectations, and the character of the government action. *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124. With respect to the third factor, the state cases cited in the preceding section show that pole attachment requirements have traditionally been regarded as the type of government action that qualifies as a taking. The Court in *Loretto* explained at some length why government-mandated physical attachment of cable equipment to business property is properly viewed as a taking. Both cables and related equipment (*e.g.*, amplifiers) are attached directly to the poles with screws or nails and bolts. Attachment prevents the owner of the property from possessing the occupied space, from excluding the occupier from possession and use of the space, and from himself making any use of the space. Moreover, the owner must permit a stranger to invade and occupy his property and must seek the co-

operation of the stranger if he wishes to repair, demolish, or construct in an area occupied by the cable equipment.

The economic impact of the Commission's order is obvious. In the absence of the order Florida Power could, pursuant to the contractual terms it previously negotiated, obtain pole attachment rents of more than three times the amount it is permitted to recover under the order.[24] The Commission's order also interferes with Florida Power's reasonable investment-backed expectations. Florida Power initially entered into pole attachment arrangements in the expectation that it would receive the rental rates negotiated by the parties and that it would be free to terminate the agreements pursuant to the contractual terms. The Commission's order radically changes the terms of the arrangements.[25]

[24] The ability to request an increase in rates charged to its utility customers would not compensate Florida Power for the loss it would suffer as a result of the Commission order. See *supra*, pp. 28-29. Moreover, to the extent Florida Power could raise its rates to compensate for the loss, the effect would be subsidization by utility customers of the cable companies.

[25] The Court in *Penn Central* noted that a restriction on use of real property may constitute a taking if it is "not reasonably necessary to the effectuation of a substantial public purpose." 438 U.S. at 127. There is considerable doubt whether that requirement is satisfied in this case. Appellants point to Congress's stated purpose of preventing pole owners from charging unreasonable rates for attachment of cable equipment. However, Congress' desire to transfer economic benefits from utility customers to cable companies would not justify physical invasion of Florida Power's property without adequate compensation. Moreover, there has been no showing that Florida Power's rates were unfair. In material submitted to the Commission, Florida Power showed that the rates it had negotiated with the cable companies are far below the amounts the companies would have been required to spend if they were operating their own already-constructed pole systems. See J.A. 93, 200, 274. In addition, the rates are below the amounts Florida Power regularly charges to telephone companies that place attachments on its poles. In those circumstances, the Commission's imposition of a rate less than one-third the lowest rate negotiated by the parties can hardly be said to be necessary to "effectuation of a substantial public purpose."

II. Congress Has Failed To Provide For A Constitutionally Adequate Determination Of Just Compensation For The Taking Of Property Pursuant To The Authority Of The Pole Attachments Act.

The fifth amendment to the Constitution requires the payment of just compensation to an owner whose property has been taken for public use. Because the Commission's order pursuant to the Pole Attachments Act effected a taking of Florida Power's property, it is necessary to consider whether the statutory scheme permits just compensation within the meaning of the fifth amendment. See, *e.g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 106 S. Ct. at 2566.

The court of appeals examined the just compensation issue from a broad perspective and concluded that the Pole Attachments Act on its face did not permit a constitutionally adequate determination of just compensation. Congress provided in the Act for some payment by cable companies to pole owners as compensation for the physical intrusion of the cable equipment. However, it did not provide that those payments should be measured according to the constitutional just compensation standard. Instead, Congress required the Commission to set rental rates within a narrow range defined by Congress in the statute, in terms of costs incurred by the pole owner. The court of appeals concluded that the approach mandated by Congress did not satisfy the constitutional requirements for the determination of just compensation, as defined by this Court.[26]

[26] Appellants read the court of appeals' opinion too broadly when they characterize it as holding the Pole Attachments Act unconstitutional on the ground that an administrative agency may never make an assessment of facts relevant to the determination of just compensation. The statements in the court's opinion should be read in the context of the unique provisions of the Pole Attachments Act, which strictly confine the determination of compensation in Commission proceedings. See J.S. App. 19a.

Examination of the pole attachments scheme confirms the court of appeals' conclusion that that scheme fails to pass constitutional muster. Because the constitutional infirmities are inherent in the statutory scheme, the court of appeals acted properly in ruling that the provisions of the Pole Attachments Act must be struck down.

A. Congress' Prescription of a Binding Formula for Determination of Pole Attachment Rental Rates Precludes a Constitutionally Adequate Determination of Just Compensation.

In a long line of cases, this Court has defined the term "just compensation" as it is used in the fifth amendment. The goal of the just compensation requirement is to put the owner of property " 'in as good a position pecuniarily as if his property had not been taken.' " *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 510 (1979) (quoting *Olson* v. *United States*, 292 U.S. 246, 255 (1934)). Generally, just compensation means the fair market value of the property on the date it is appropriated. *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1, 10 (1984); *United States* v. *564.54 Acres of Land*, 441 U.S. at 511; *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123, 130 (1950).

Under the fair market value standard, the owner of property is entitled to receive what a willing buyer would pay to a willing seller at the time of the taking. *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. at 10; *United States* v. *564.54 Acres of Land*, 441 U.S. at 511; *United States* v. *Miller*, 317 U.S. 369, 374 (1943).[27] Measures of just compensation other than fair market value are used only when market value is too difficult to find or when its use would result in "manifest injustice." *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. at 10

[27] This measure of compensation applies equally to property owned by utilities. See *United States* v. *Virginia Elec. & Power Co.*, *supra*, 365 U.S. at 631-33.

n.14; *United States* v. *564.54 Acres of Land*, 441 U.S. at 512-13; *United States* v. *Commodities Trading Corp.*, 339 U.S. at 123.

This Court has also held that the determination of whether an owner whose property has been taken has received just compensation is ultimately a judicial function. Congress may not preempt that judicial function by prescribing a binding rule designed to restrict or prevent a court from determining constitutionally adequate compensation. The Court articulated this well-established doctrine in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893). In that case Congress had authorized the Secretary of War to purchase a lock and dam from the navigation company at a price not to exceed $161,733.13 and had stated expressly that the company's franchise to collect tolls was not to be considered in estimating the sum to be paid. The Court rejected these congressional limitations, concluding that an award of just compensation must include payment for the franchise to take tolls as well as for the value of the tangible property. In the course of its opinion, the Court stated:

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

148 U.S. at 327.

The Court has repeated this basic proposition on a number of occasions. In *Baltimore & Ohio Railroad* v. *United States*, 298 U.S. 349, 368-69 (1936), the Court stated:

> The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause. If as to the value of his property the owner accepts legislative or administrative determinations or challenges them merely upon the ground that they were not made in accordance with statutes governing a subordinate agency, no constitutional question arises. But, when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it. (Footnote omitted.)

See also, *e.g.*, *United States* v. *Commodities Trading Corp.*, 339 U.S. at 124 n.3; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51-52 (1936); *United States* v. *New River Collieries Co.*, 262 U.S. 341, 343-44 (1923); *Chicago, Milwaukee & St. Paul Railway* v. *Minnesota*, 134 U.S. 418, 458 (1890); *Miller* v. *United States*, 620 F.2d 812, 837 (Ct. Cl. 1980); *American-Hawaiian Steamship Co.* v. *United States*, 124 F. Supp. 378, 381, 129 Ct. Cl. 365, 371 (1954), *cert. denied*, 350 U.S. 863 (1955).

The Pole Attachments Act does not fix in dollars and cents a single maximum rental rate that can be charged by pole owners for attachment of cable equipment. However, the Act does set out a binding formula that the Commission is obliged to follow in determining rental rates, which does prescribe a maximum rate. That formula makes no reference to the fair market value of utility pole space; nor does it speak in terms of a transaction between a willing buyer and a willing seller. Rather, it requires the Commission to prescribe rental rates that fall within a narrow range between two cost-based measures. The Act states that compensation to the pole owner shall be:

> not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1).

The cost-based measure of compensation prescribed by Congress is obviously not equivalent to the constitutional measure of just compensation as defined by this Court. A rental rate based on cost is not the same as a rate based on fair market value reflecting the figure at which a willing buyer of pole space would rent from a willing seller. As a simple illustration, a congressionally-mandated rule that limited recovery for governmental taking of a residence to the homeowner's cost would surely not satisfy the fair market value standard and would be subject to constitutional challenge.[28]

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[28] The government argues (Gov't Br., pp. 20-22) that the upper limit of the measure set by Congress, *i.e.*, "fully allocated costs," is equivalent to just compensation within the meaning of the fifth amendment, citing *Alabama Power Co.* v. *FCC*, 773 F.2d 362 (D.C. Cir. 1985). The court in *Alabama Power* was not asked to decide whether the measure of compensation under the Pole Attachments Act satisfied constitutional standards. *Id.* at 365.

The discrepancy between the cost-based measure prescribed by the Pole Attachments Act and the fair market value standard is well illustrated by the facts of this case. The annual rental rates negotiated by Florida Power and the cable companies prior to the Commission's intervention ranged from $5.50 per pole to $7.15 per pole. Annual rental rates negotiated by Florida Power and the telephone companies that attach their wires to Florida Power's poles are approximately $9 per pole. And the United States Court of Appeals for the Sixth Circuit affirmed a trial court's express finding that an annual cable attachment rate of $5.60 per pole was reasonable. *Continental Cablevision* v. *American Electric Power Co.*, 715 F.2d 1115, 1121 (1983).[29] By contrast, the Commission's application of the congressionally-mandated cost-based standard yielded an annual rental rate of $1.79 per pole—less than one-third of the lowest amount negotiated by the parties.[30]

The binding formula set out in the Pole Attachments Act explicitly constrains the Commission in its decision-

[29] In *Continental Cablevision*, cable companies contended that a rate of $5.60, instituted in 1975, was "unreasonable." Although the district court had deemed the rate of $5.60 reasonable in granting the defendant utilities' counterclaim for unpaid rents, the cable companies on appeal put forward the charge of "unreasonableness" in support of an unsuccessful claim of antitrust violations. The court of appeals affirmed the district court's finding that the rate was reasonable. 715 F.2d at 1121.

[30] Appellants imply (*e.g.* Gov't Br., p. 22 n.28) that fair market value may be an inappropriate measure of just compensation in pole attachments cases because the rental rates negotiated by utilities and cable companies allegedly were unreasonably high as a result of the superior bargaining position of pole owners. There has been no showing that the rates negotiated by Florida Power and the cable companies were in any way unfair or unreasonable. Those rates compare favorably with the annual rental rates of $9 per pole charged to telephone companies that string their wires on Florida Power's poles. Moreover, the rates charged by Florida Power were far lower than the annual cost of $17 to $20 per pole that a cable company would incur if it owned an already-constructed pole system. See J.A. 93, 200, 274.

making in connection with complaints filed under the Act. The statutory formula precludes the Commission from considering factors that are clearly relevant to a determination of just compensation within the meaning of the fifth amendment. The statute provides no mechanism for an independent judicial determination of a rental rate that would yield just compensation. Because Congress in enacting the formula has effectively appropriated for itself the determination of compensation to be paid to pole owners whose property has been taken through attachment of cable equipment, the Act is unconstitutional.

B. Appellate Review of Commission Orders Pursuant to the Pole Attachments Act Cannot Satisfy the Constitutional Requirements for Determination of Just Compensation.

Appellants concede that determination of just compensation is ultimately a judicial function. They contend, however, that the Constitution is satisfied so long as there is some judicial review of an agency's compensation determination. According to appellants, review of Commission orders pursuant to 47 U.S.C. § 402(a) and 5 U.S.C. § 706 affords an adequate opportunity for judicial determination of just compensation in pole attachments cases.

We submit that judicial review of Commission orders pursuant to the Pole Attachments Act is not sufficient to render the Act constitutional. We note as a preliminary matter that none of the cases cited by appellants holds expressly that judicial review of an award of compensation on an administrative agency record is sufficient to meet the constitutional requirements for determination of just compensation.[31]

[31] The holding in *Bauman* v. *Ross*, 167 U.S. 548 (1897) resolved a seventh amendment issue. The Court's reference in *Bauman* to an estimate of just compensation by any but court-appointed and court-supervised commissioners, 167 U.S. at 593, appears to constitute dicta. In *United States* v. *Jones*, 109 U.S. 513, 517 (1883) a trial de novo on

Even if it is assumed that judicial review of agency findings with respect to compensation might be sufficient in some circumstances to satisfy the requirement of a judicial determination of just compensation, it is nevertheless inadequate in the case of the Pole Attachments Act. Judicial review arguably might be sufficient in the case of a statutory scheme under which the administrative agency had the flexibility to accept evidence of fair market value and to make a determination based on constitutional principles of just compensation. For example, a statute that merely instructed the agency to establish a "reasonable" or "just" rental rate would allow the agency to fix compensation at a level that would satisfy constitutional requirements. Under such a statutory scheme the reviewing court would have access to an administrative record sufficient to permit a determination of whether the agency had arrived at a constitutionally adequate amount.

The situation is very different under the Pole Attachments Act. Congress has not given the Commission the flexibility that would allow it to identify the constitutional amount of just compensation.[32] Instead, it has instructed

the issue of compensation was available. In *United States* v. *Commodities Trading Corp.*, *supra*, the Court addressed the adequacy of a compensation award, but not the constitutionality of the procedure for determining compensation. In *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the Court recognized the availability of a Tucker Act remedy against the United States—a proceeding that presents an opportunity for *de novo* judicial determination of just compensation. See *infra* n.32.

[32] On several occasions this Court has suggested that the availability of a remedy against the United States under the Tucker Act, 28 U.S.C. § 1491, would obviate constitutional objections to a statute that on its face failed to provide for a judicial determination of just compensation. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-20 (1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-36, 148-49 (1974). This point is not pursued in detail by the government, and quite rightly because the Tucker Act could not save the Pole Attachments Act scheme. There is no indication that Congress intended that the federal government subsidize the cable television industry, which is the

the Commission to calculate a rate that must fall between two measures of the pole owner's costs. In practice, the record created at the agency level consists only of information relating to the narrow range of costs the Commission regards as relevant to its calculation of "fully allocated costs." See 47 C.F.R. § 1.1404(g) (1985). The Commission relies on affidavits of the parties providing proposed cost calculations, the contracts between the parties, and information on file with the Federal Energy Regulatory Commission. The court of appeals has this limited record before it when it reviews a pole attachments order. It does not have access to evidence of the fair market value of pole space, such as contract rates established in arms-length negotiations between electric utility companies and telephone companies and testimony by economic experts. The reviewing court therefore lacks a factual basis for determining whether the rental rate set by the Com-

beneficiary of reduced pole attachment rentals, at the expense of federal taxpayers. Indeed, the indication is to the contrary—that Congress intended to withdraw the Tucker Act remedy. The Pole Attachments Act expresses an unequivocal intent to limit utilities' compensation to the maximum amount the formula in § 224 allows. As is discussed more fully, *supra*, pp. 31-37, this limitation is inconsistent with an award of compensation under the fifth amendment. By contrast, in *Monsanto*, there was no statutory restriction relating to the determination of the proper compensation; thus the statute in no way imposed a limitation on the award that would conflict with a determination under the Tucker Act.

Moreover, in view of the large number of pole attachments contracts (see S. Rep. No. 95-580, *supra*, p. 12, estimating that there were 7800 such agreements in effect as of 1977), the potential for Tucker Act suits would be quite substantial. Inferring a Tucker Act remedy in order to preserve the Pole Attachments Act would lead to a system under which on repeated occasions there would be judicial review of the Commission order in the court of appeals and, subsequently, a Tucker Act proceeding in the Claims Court to consider the just compensation issue, again followed by judicial review. This Court recently rejected the suggestion that Congress in another context intended such a wasteful result. See *Lindahl* v. *Office of Personnel Management*, 105 S. Ct. 1620, 1637 (1985).

mission satisfies constitutional standards for just compensation. In these circumstances, the court of appeals properly concluded that the Pole Attachments Act is constitutionally defective in such fundamental respects that it must be struck down.[33]

The court of appeals' holding by no means disables Congress in its efforts to address any perceived problems in the pole attachments area. If this Court were to affirm the decision below, and if Congress were to continue to regard adjustment of negotiated contract rates as worthwhile, it could easily correct the statutory scheme by, *e.g.*, affording a broad mandate to the Commission to determine just compensation in the first instance and providing for *de novo* judicial determination of the compensation due to

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[33] The only other conceivable alternatives would have been for the court of appeals, faced with an agency record relevant to the statutory cost-based formula, to have (1) examined the record to see whether it contained additional evidence that would allow the court to decide the just compensation issue; (2) requested that the parties supplement the record in the court of appeals with evidence that would permit the court, acting as a trier of fact, to make the necessary judicial determination of compensation; or (3) remanded to the Commission for supplementation of the record beyond the scope of the statutory mandate. Any of these approaches would fly in the face of the express language of the statute and its congressionally prescribed formula. Moreover, none of these approaches comports with the respective roles of administrative agencies and reviewing courts.

In its brief (at p. 28), the government cites *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 320 (1953), in support of the proposition that a reviewing court may cure inadequacies in the record by permitting introduction of new evidence at the appellate level. The Court's reference in *American Trucking Ass'ns* was not to a court of appeals reviewing the decision of an agency on the administrative record, but to the federal district court from which the plaintiffs had sought injunctive relief under certain provisions of the Interstate Commerce Act. Unlike a district court, a court of appeals is not equipped to conduct evidentiary hearings or to make independent findings of fact.

pole owners. However, the present statutory scheme is clearly defective and cannot survive.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 1986

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Nos. 85-1658 (17)
85-1660 (16)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellants,
v.
FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
Appellants,
v.
FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal From The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR APPELLEES ALABAMA POWER COMPANY ARIZONA PUBLIC SERVICE COMPANY and MISSISSIPPI POWER & LIGHT COMPANY

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit was correct in holding that a federal statute authorizing the permanent physical occupation of an electric company's property by a cable television company constitutes a taking of the electric company's property, for which just compensation is required?

2. Whether the Eleventh Circuit was correct in holding that Congress may not impose a binding rule on the Judiciary concerning what compensation is "just" under the fifth amendment?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following parties participated in the proceeding before the Eleventh Circuit: National Cable Television Association, Inc., Cox Cablevision Corporation, Tampa Electric Company, Mississippi Power & Light Company, Arizona Public Service Company, Alabama Power Company, and Acton Corporation.[1]

[1] Pursuant to Supreme Court Rule 28.1, Mississippi Power & Light Company has the following affiliates: Arkansas Power & Light Co., Louisiana Power & Light Co., System Fuels, Inc., Middle South Energy, Inc., Middle South Services, Inc., and Middle South Utilities, Inc. Alabama Power Company has the following affiliates: Georgia Power Co., Gulf Power Co., Piedmont Forest Co., Southern Company Services, Inc., Southern Electric Generating Co., Southern Electric International, Inc., and The Southern Company. Arizona Public Service Company has the following affiliates: AZP Group, Inc., APS Fuels Co., APS Finance Co., N.V., and Bixco, Inc.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 772 F.2d 1537. The orders of the Federal Commu-

nications Commission and its Common Carrier Bureau are unreported.

JURISDICTION

Jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1252. Probable jurisdiction was noted on June 2, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The fifth amendment to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutory provision at isue in this proceeding, the Pole Attachment Act, is set out at 47 U.S.C. § 224 (West Supp. 1985).

COUNTERSTATEMENT OF THE CASE

The Statutory Framework

As recounted by the court below, since the advent of cable television in the 1950s, most cable companies have constructed their distribution systems by attaching their equipment to the distribution poles owned by telephone and electric utilities. The attachments are made pursuant to private contracts between the pole owner and the cable company, and usually specify an annual fee to be paid to the pole owner.

In 1978, Congress enacted legislation providing the Federal Communications Commission with jurisdiction

to regulate the rates, terms and conditions of cable television pole attachments. Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C. § 224 (West Supp. 1985)) ("Pole Attachment Act"). Congress directed the FCC to set "just and reasonable" pole attachment rates, and established a binding formula that the FCC must use in determining what rates are just and reasonable. Pursuant to that formula, the FCC has ruled that on a typical utility pole, on which three parties have attachments (the electric, telephone, and cable companies), the cable company may be charged no more than one-thirteenth of the costs of owning and maintaining the pole. *Second Report and Order in CC Docket 78-144*, 72 F.C.C. 2d 59 (1979).[1] In addition to regulating rates, the FCC has also exercised control, pursuant to the Act, over the entry and exit of utilities from the provision of pole attachments. In a variety of orders, the FCC has required utilities to provide new pole attachments, and prevented utilities from ceasing to provide pole attachments.[2]

[1] The cable interests contend, and the Act is premised upon the notion, that cable operators have no alternative but to attach their equipment to utilities' property. However, it is quite feasible to place cable facilities underground instead. In point of fact, both utilities and cable operators increasingly are forced to bury their facilities because of community opposition to aboveground lines. *Cf.* S. Rep. No. 580, 95th Cong., 1st Sess. at 18 (Nov. 2, 1977) *reprinted in* 1978 U.S. Code Cong. & Admin. News 109, at 126.

[2] In enacting this legislation, Congress elected not to regulate the rates charged for a number of similar types of attachments, for example, the rates electric companies charge telephone companies for attachment. According to the legislative history, this is because electric and telephone companies were found to pos-

The Case Below at the FCC

In 1980 and 1981, Teleprompter Corp. and several other cable firms filed complaints against Florida Power at the FCC asking the Commission to abrogate their pole attachment contracts with Florida Power and substitute lower rates for the rates they had agreed to in their agreements. Florida Power responded to the cable operators' complaints by alleging that its rates were fully justified, and pointing out that the relief requested by the cable operators (if granted) would violate constitutional prescriptions against the taking of private property for public use without just compensation.

The FCC's Common Carrier Bureau, acting on delegated authority, granted the cable operators' requests in full. In fact, the Common Carrier Bureau lowered Florida Power's rates even further than the cable operators had requested. In place of the $6.00 rates contained in the cable operators' contracts with Florida Power, the Common Carrier Bureau substituted a rate of $1.79. Although the cable operators had not objected to paying the maintenance expenses established by Florida Power, the Common Carrier Bureau *sua sponte* disallowed the majority of this ex-

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sess relatively equal bargaining power. The rates negotiated in these arms-length transactions generally exceed cable television rates significantly. For example, while telephone attachment rates are generally $9-$12, cable attachment rates averaged $4-$6. Under the FCC's formula, however, rates have averaged approximately $1.75, and at times have been set as low as $0.75. In most cases, FCC rate orders have mandated reductions averaging 65-80% of the contract rate. *E.g.*, Tele-Communications, Inc. v. Mountain States Tel. & Tel. Co., FCC Mimeo No. 1948 (released Dec. 27, 1983) (80% reduction when rate lowered from $4.00 to $0.83).

pense. The Common Carrier Bureau disallowed more than half of the administrative expenses documented by Florida Power, and permitted only four limited categories of administrative expense to be recovered, pursuant to a ratemaking methodology later held to be arbitrary and capricious by the District of Columbia Circuit. *Alabama Power Co. v. FCC*, 773 F.2d 362, 370 (D.C. Cir. 1985). The Bureau permitted Florida Power to recover less than one-third of its tax expenses, pursuant to a policy later held to be arbitrary and capricious by the Fifth Circuit in *Texas Power & Light Co v. FCC*, 784 F.2d 1265, 1272 (5th Cir. 1986).[3] The Bureau completely ignored Florida Power's constitutional arguments.[4]

Florida Power filed a timely application for administrative review, requesting the full Commission to reverse the Common Carrier Bureau's ruling, and pointing out errors in the Bureau's rate computation. Rather than ruling on Florida Power's appeal, however, the FCC staff refused to process the application.

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[3] In addition to the present case, two other FCC pole attachment complaint cases have been reviewed in the courts of appeal. In *Alabama Power Co. v. FCC, supra*, Appellee Alabama Power Company challenged five aspects of the FCC's rate computation in its case as arbitrary and capricious. The D.C. Circuit ruled against the Commission with respect to each issue. In *Texas Power & Light Co. v. FCC, supra*, the utility challenged two aspects of the FCC's rate computation. The Fifth Circuit vacated the FCC's order and remanded for further analysis of both issues. Neither of those cases, however, presented the constitutional issues to be decided here.

[4] In dozens of cases, including all of the complaint cases that have been reviewed by the appellate courts, the FCC reduced the rates of the utility even lower than the cable operators had requested.

1981 passed... 1982 passed... 1983 passed... Finally, late in 1984, the Commission issued a brief decision rejecting all of Florida Power's arguments, and summarily affirming the Common Carrier Bureau's earlier actions.[5]

The Decision of the Court of Appeals

On appeal, the Eleventh Circuit vacated the FCC's order. The court of appeals applied the decision of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and found that the FCC order authorizing the permanent physical occupation of Florida Power's property for less than one-third of the rate agreed to by Teleprompter Corp. (and its successor-in-interest, Group W Cable, Inc.) constituted a taking of Florida Power's property. Having found a taking, the court of appeals held that the procedures established under the Pole Attachment Act (and in particular the binding rate formula) were inadequate to ensure that Florida Power will receive just compensation as required by the fifth amendment. The court held that the principle of separation of powers precludes Congress from prescribing a binding rule for the determination of just compensation, which, the court held, is a judicial function. Since the Pole Attachment Act prescribes just such a binding rule, the court held that the Act was constitutionally inadequate, and vacated the FCC's order. For this point, the Eleventh Circuit relied principally upon *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), as well as more recent precedents.

[5] At no time was an evidentiary hearing held, nor is there any separation of functions on the FCC Staff. The same staff members that rule on the case for the Common Carrier Bureau are responsible for drafting the opinion for the full Commission.

Appellees ("the Utility Parties") submit that each point of the Eleventh Circuit's analysis is correct and well grounded in the decisions of this Court.

SUMMARY OF ARGUMENT

The facts in this case are virtually indistinguishable from *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*. The court of appeals correctly held that the permanent physical occupation of Florida Power's utility poles authorized by the Pole Attachment Act amounts to a taking of Florida Power's property, just as the permanent physical occupation of a New York landlord's property amounted to a taking in *Loretto*.

The Federal Appellants' contention that the Pole Attachment Act gives the cable operators no right to attach equipment to Florida Power's poles overlooks numerous FCC decisions providing exactly that, as well as the extensive nature of the regulation that the FCC exercises over access to poles. The FCC has on numerous occasions required utilities to provide access to poles, as well as prevented utilities from ceasing to provide access to poles.

The cable operators' contention that utilities do not lose money when pole attachment rates are reduced is factually incorrect. Lost pole attachment revenues are not simply offset by increases in electric rates, they are lost forever.

Finally, the court of appeals correctly held that Congress cannot establish a binding rule pursuant to which the FCC must limit the compensation to be paid for the taking of utility property.

ARGUMENT

I. The Court of Appeals Correctly Applied The Loretto Doctrine to the Facts of this Case.

The fifth amendment to the United States Constitution prohibits the taking of private property for public use without the payment of just compensation. For many years, the courts have struggled to determine when a governmental interference with property rights will constitute a "taking." In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court provided clear guidance as to when a taking will be found.

The issue in *Loretto*, as stated by Justice Marshall, was "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which compensation is due under the Fifth and Fourteenth Amendments of the Constitution." 458 U.S. at 421. This Court answered that question in the affirmative.

Loretto involved a New York statute that prohibited landlords from interfering with the installation of cable television facilities on their premises, as well as prohibiting them from charging cable operators more than a one-time fee of $1.00 for the right to occupy their property. 458 U.S. at 424. The New York Court of Appeals upheld the statute as a legitimate exercise of the police power. *Id.* This Court reversed on the grounds that application of the statute effected a taking. *Id.* at 426.[6]

[6] Historically, this Court has taken a much stricter view of physical invasions of property than of non-possessory regulations on use. In *Loretto*, as in this case, a physical invasion of property was at issue. *See Loretto*, 458 U.S. at 440 n.19. At one time, physical invasions were the only type of actions that were recognized as takings. In the early years of this century, however, in cases such as Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), this Court began to expand the type of actions that could be considered a taking, to include certain types of non-possessory regulations. For these non-possessory actions, the Court developed a three factor test for determining whether a taking has occurred. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). Appellants confuse the traditional standard for physical invasions, as described in *Loretto*, with the test for non-possessory regulations, Brief for Appellants at 22, but the two are not the same.

The *Loretto* decision affirmed the traditional rule that a permanent physical occupation authorized by the government is a taking *per se*. *Id.* at 434-35. Application of that standard to the facts of this case leads inescapably to the conclusion that Florida Power's property has been taken in the same manner and to the same degree as was the New York landlord's property in *Loretto*.

The equipment Teleprompter (and later Group W Cable) attached to Florida Power's poles, as the court of appeals noted, is "virtually indistinguishable" from the equipment it attached to Mrs. Loretto's apartment house in New York. 772 F.2d at 1544. There can be no dispute that the equipment physically occupies Florida Power's distribution poles.

It is also clear that these attachments are neither temporary, nor invited at the reduced rates mandated by the FCC and Congress. Many utilities have had cable attachments on their poles continuously since the 1950s—a period of some 30 years. This is hardly temporary. Moreover, the attachments have been authorized or compelled by the FCC on numerous oc-

casions. As noted, in addition to exercising rate regulation, the FCC has exercised a form of entry and exit regulation pursuant to its statutory mandate. In some cases, the FCC has required utilities to provide new pole attachments. In others, it has refused to permit utilities to cease providing existing pole attachments. In one case, the FCC ruled that a utility must expand its pole facilities to make room for additional new cable attachments.[7] These cases establish clearly that cable attachments are "authorized" by the Act within the meaning of *Loretto*.

A review of several FCC decisions will illustrate the broad scope of the entry/exit regulation exercised

[7] Group W, in an attempt to distinguish *Loretto*, asserts that because Florida Power is subject to regulation as an electric utility it is not entitled to fifth amendment protection with respect to the physical occupation of its property by cable companies. Of course, this overlooks the fact that Mrs. Loretto's apartment house was dedicated to the New York housing market and subject to New York City's rent control law and numerous other housing ordinances. This Court found no diminution of her constitutional rights, however. Group W is essentially trying to create a "utility exception" to the fifth amendment, a theory that must be firmly rejected. This Court recently rejected the notion that utilities were somehow second-class citizens not entitled to the full constitutional protections accorded others. Pacific Gas and Elec. Co. v. Public Util's Comm'n of California, 106 S.Ct. 903 (1986). *See also* Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York, 447 U.S. 530 (1981). The longstanding rule of this Court is that even utility property that is clothed with a public interest, and dedicated to public use, remains private property subject to full constitutional protections. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936). In the case of the rental of pole space, moreover, the courts have held that this is not a utility service or property devoted to public use. General Tel. Co. v. FCC, 413 F.2d 390, 393 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

by the FCC. Utilities and cable operators at times have become embroiled in disputes over such matters as late payment (and non-payment) of rentals, attachments not made in compliance with safety code requirements, the making of unauthorized attachments, and so on. Some utilities involved in these disputes have sought to cancel their pole attachment contracts with cable operations. In each of these cases, the FCC has issued orders preventing the utilities involved from terminating service to the cable operators involved, even where the cable operator had violated certain terms in the pole attachment agreement or where a termination provision in a contract was lawfully invoked. *E.g.*, *Whitney Cablevision v. Southern Indiana Gas & Electric Co.*, Mimeo No. 841 (Nov. 16, 1984) (unauthorized attachments); *Tele-Communications, Inc. v. South Carolina Electric & Gas Co.*, Mimeo No. 5957 (Aug. 16, 1983) (safety violations, unauthorized attachments, late payments). It may be that these cases reflect sound public policy, and that utilities should not be permitted to cease providing pole attachments under these circumstances. But that does not transform the utilities' participation into a voluntary undertaking, nor does it detract from the coercive nature of the government's exercise of entry/exit regulation. The cable interests fail to cite even a single instance in which a utility has been permitted by the FCC to refuse to allow a cable operator to continue to occupy space on its poles.[8]

[8] The government suggests that the case may not be ripe because Florida Power has not yet attempted to physically remove Teleprompter's equipment. Such a move would clearly be futile in light of the FCC's numerous rulings prohibiting utilities

In one significant case, *David Bailey d/b/a Port Gibson Cable TV v. Mississippi Power & Light Co.*, Mimeo No. 36118 (released Sept. 11, 1985), a cable operator asked Appellee Mississippi Power & Light Company to replace approximately 50% of its poles in a small town in Mississippi in order to permit the attachment of its cable. Some of the attachments would be on poles already occupied by an existing cable operator, and some would be in new developments where no cable attachments currently existed. The addition of further attachments on poles already occupied by existing power, telephone and at times cable facilities required that more than half the poles would have to be replaced. Mississippi Power & Light Company protested at the FCC that the cost of so many pole replacements would be prohibitive, that multiple attachments created additional safety hazards for MP&L's linemen climbing on the poles, and that its personnel were needed elsewhere. MP&L further argued that the FCC should not (for constitutional reasons) order access on poles, and that it simply did not want to engage in this business. The FCC rejected these contentions and held that Mississippi Power & Light Company must replace its poles and expand its facilities in order to permit the cable

from doing precisely that. Furthermore, the government's argument is inconsistent with this Court's holding in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). There, the Court held that bankruptcy judges who are appointed for fixed terms, could be removed for cause, and who could suffer salary diminution, could not constitutionally exercise certain powers granted them in the Bankruptcy Act of 1978, notwithstanding the fact that no removal or salary diminution had been attempted. The Court rejected the argument that the case was not ripe for decision because no removal or diminution had been attempted.

company to attach. *Id.* at para. 14. MP&L was ordered to provide attachments even on poles where no current cable attachment existed. *Port Gibson* flatly contradicts any assertion that cable attachments are simply a matter of invited access. Mississippi Power & Light Company is under direct order by the FCC to permit the occupation of its poles by Port Gibson Cable TV—*even on poles where no other communications attachment exists*. This can hardly qualify as a case of invited access.[9]

The court of appeals also properly recognized that Florida Power's invitation to Teleprompter to occupy its poles at one price does not imply an invitation to occupy its poles at a small fraction of that price established by the FCC. 772 F.2d at 1543. It is a matter of elementary law that a property owner's consent for a stranger to enter his property subject to a condition does not imply consent if the condition is not met. *Restatement (Second) Torts*, § 168 (1965).[10]

[9] Again, even assuming *arguendo* that sound policy reasons may exist for requiring such access, it is not invited access. Furthermore, an invitation to one does not imply an invitation to all, nor does an invitation for a prescribed time period imply a permanent invitation.

[10] Appellants strenuously argue that utilities are subject to regulation, Brief for Appellants at 18-20, a point not in dispute. What is at issue here is a taking, not regulation. Furthermore, simply because electric companies are regulated with respect to one aspect of their affairs, does not mean that they have a utility obligation with respect to all other aspects. For example, some electric utilities sell ranges, refrigerators, and even light bulbs. No one would contend that these are utility obligations. Furthermore, the provision of pole attachments has long been held to be a matter of private contract, not a common carrier, utility-type obligation. General Tel. Co. v. FCC, 413 F.2d 390, 393 (D.C. Cir.) *cert. denied*, 396 U.S. 888 (1969).

Appellants suggest that Florida Power suffered no loss when its pole attachment rates were reduced by two-thirds pursuant to the FCC's rate formula, because it allegedly could make up the difference by increasing the rates to its electric ratepayers. Brief for Appellants at 7,23. Such a suggestion is as poorly conceived in policy as it is erroneous in fact. As the Fifth Circuit recognized in *Texas Power & Light Co.*, it is unreasonable to permit cable operators to escape payment for their share of pole costs by thrusting those costs on the general body of ratepayers. 784 F.2d at 1272. Furthermore, it is untrue that all pole costs not borne by the cable operators are necessarily picked up by electric ratepayers. Some state commissions do not simply offset pole attachment revenues against retail electric rates. Furthermore, even where electric rates are premised on receiving a certain amount of revenue from cable operators, when that amount is reduced by the FCC, only the utility loses until its rates are readjusted.[11] Finally, even if some state utility commissions did permit the recovery of a pole attachment shortfall from electric ratepayers, the cable operators have cited no proposition

[11] At several points the cable interests grossly misconstrue the nature of utility ratemaking when they assert that utilities are "guaranteed" to receive their rate of return. At best, utilities are theoretically assured of the opportunity to earn their authorized rate of return, which they may or may not achieve, but they are not assured of receiving anything. The cable interests depict a 19th century view of utility regulation, in which there is a complete monopoly by the utility, and perfect ratemaking by regulatory commissions, assuring complete cost recovery. This view is inconsistent with the pro-competitive and deregulatory policies favored by most states. Electric companies now face competition in their service areas for many services. In this environment, their returns are anything but guaranteed.

of law that would require them to continue the practice, nor any reason in policy why they should.

The poles owned by utilities are used for rental purposes, in addition to their use for attaching electric wires. Utilities rent space on their poles to numerous entities. Space is rented to telephone companies to attach telephone wires; to municipalities to attach street lights and signs; to cable operators for cable attachments; and increasingly to fiber optic networks to attach fiber optic facilities for advanced telecommunications services. Together, these rentals make an important contribution to a utility's revenues. The drastic reduction of these revenues, or the cable operator's portion of them, clearly results in a loss for the utility.[12]

[12] The Federal Appellants argue that cable operators use only space that is surplus and not needed for electric lines. Brief for Federal Appellants at 18. This overlooks the rental value that pole space has traditionally been used for by electric companies. Thus, utilities are deprived of the use of the space for rental purposes. Furthermore, Federal Appellants' claim that Florida Power may reclaim the pole space at any time, *id.* at 18, appears to misconstrue the contractual provisions at issue. These provisions, read in their entirety with other provisions of the contract, do not appear to permit Florida Power to exclude cable operators from its poles, but rather merely permit Florida Power to install new or larger poles when necessary. Both the Federal Appellants and the cable operators appear to concede this point. Brief for Federal Appellants at 18 n.24; Brief for Appellants at 25 n.58. It is the general practice of utilities to pay for a new pole themselves when such replacements are necessary due to increases in their needs for space.

The Federal Appellants' claim that cable television occupation of poles is not "permanent" within the meaning of *Loretto* appears inconsistent with its position in McDonald, Somers &

II. The Pole Attachment Act Is Unconstitutional Because It Does Not Provide For a Proper Judicial Determination of Just Compensation for Property Taken Under the Act.

The Eleventh Circuit correctly found that the Pole Attachment Act is unconstitutional because it allows Congress, rather than the judiciary, to determine what constitutes just compensation for the taking of Florida Power's property.[13] Under the Act, the FCC is required to establish the pole attachment rates that a utility may charge pursuant to a binding formula mandated by Congress. The Eleventh circuit correctly concluded that "[b]y prescribing a binding rule in regard to the ascertainment of just compensation, Congress has usurped what has long been held an exclusive judicial function." 772 F.2d at 1546 (citations omitted).

Frates v. County of Yolo, No. 84-2015 (June 25, 1986), wherein the government argued that even temporary takings required compensation. Brief for the United States at 19. There, the government pointed out that even the appropriation of a leasehold interest is within the scope of the fifth amendment, citing United States v. General Motors Corp. 323 U.S. 373 (1945) and Kimball Laundry Co. v. United States, 338 U.S. 1 (1949)

[13] Contrary to appellants assertions, the Eleventh Circuit did not find the Pole Attachment Act unconstitutional on the grounds that an administrative agency may never make an assessment of facts relevant to the determination of just compensation. The decision is a narrow one directed at the unique statutory and administrative scheme created by the Pole Attachment Act. Other statutory schemes may pass constitutional muster even though they incorporate the relevant factual findings of an administrative agency. However, the Pole Attachment Act both restricts the scope of the FCC's inquiry into the issue of compensation for the use of Florida Power's poles by cable companies, and does not allow for a judicial determination of just compensation for the resulting taking of private property.

The decision below is consistent with the well established doctrine that just compensation for the governmentally authorized taking of private property is a constitutional right, and the ultimate determination of what compensation is just is reserved to the judiciary. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). The availability of limited judicial review of an administrative record restricted by Congress does not satisfy the constitutional requirement that the judiciary ultimately determine just compensation. The decision below is also consistent with this Court's recent attempts to insure that there is no "broad departure from the consitutional command that the judicial power of the United States must be vested in Article III courts," and not in Congress. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982). *See also United States v. Raddatz*, 447 U.S. 667 (1980).

A. The Pole Attachment Act Usurps the Judiciary's Power to Determine Just Compensation for a Taking of Property.

Under the Pole Attachment Act, the FCC is required to award compensation for the use of a utility's poles pursuant to a binding formula used to calculate a "just and reasonable" rate for cable attachments. 47 U.S.C. § 224(b) and (d). This formula specifies that a utility recover:

> not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity which is occupied by the pole attachment, by the sum of the operating expenses and actual capital

costs of the utility attributable to the entire pole, duct, conduit or right of way.

47 U.S.C. § 224(d). In practice, the FCC has focused on determining the maximum rate for pole attachments. The rule applied by the FCC to establish the maximum rate a utility may charge a cable company reduces to the following formula:

$$\text{Maximum Rate} = \frac{1 \text{ foot}}{13.5 \text{ feet}} \times \text{Operating Expenses} + \text{Capital Costs of Pole}$$

The FCC is required to award compensation within the bounds of this formula. Consequently, the FCC only considers information related to the elements of the statutory formula in its resolution of complaints filed by cable companies.

As a measure of just compensation for a taking of property under the fifth amendment, the Act's formula is overly restrictive. It establishes pole attachment rates based on the limited factors selected by Congress alone, while ignoring factors traditionally held relevant by the Judiciary to the determination of just compensation, such as fair market value. *See, e.g., Kirby Forest Industries v. United States*, 104 S.Ct. 2187, 2191 n.14 (1984); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 126 (1950); *United States v. Miller*, 317 U.S. 369, 374 (1943); *United States v. 320.0 Acres of Land, More or Less, in County of Monroe, State of Florida*, 605 F.2d 762, 781 (5th Cir. 1979); *United States v. 15.3 Acres of Land, Etc.*, 154 F.Supp. 770-78 (M.D. Pa. 1957). The formula's failure to permit the consideration of fair market value, or other factors that may be relevant,

severely limits the scope of FCC proceedings.[14] In place of a determination of just compensation pursuant to factors long held by this Court to be relevant, the Pole Attachment Act prescribes a "binding rule" which leaves the FCC no latitude to explore or award fair market value or any other constitutionally acceptable measure of compensation.[15]

In striking down the Pole Attachment Act, the Eleventh Circuit relied on the well established doc-

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[14] While acknowledging this fact, the government relies on *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950), to argue that the Pole Attachment Act's formula should be accepted as the measure of just compensation anyway. *United States v. Commodities Trading Corp.* is inapposite. In that case, the Court accepted ceiling prices fixed during World War II by the Emergency Price Control Act of 1942 as the measure of just compensation because "the necessities of a wartime economy require[d] that ceiling prices be accepted as the measure of just compensation. . ." 339 U.S. at 125. The Court was careful to point out that "[i]n peacetime when prices are not fixed, the normal measure of just compensation [is] current market value." 339 U.S. at 126.

The government also cites dicta in *Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) in support of its argument that the congressional formula is equivalent to just compensation. However, the court of appeals in Alabama Power expressly noted that it had not been asked to decide whether the congressional formula satisfied constitutional standards. 773 F.2d at 367 n.8.

[15] The utilities have argued, for example, that one measure of fair market value might be the comparable terms negotiated between electric and telephone companies, two entites Congress has found to be of roughly equal bargaining power. A survey of the results of these arms-length transactions might be considered evidence of fair market value, since the telephone company's attachment to the pole is virtually indistinguishable from the cable company's.

trine that Congress may not limit or prevent the judiciary from ultimately determining compensation for a taking of private property. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 and 77-78 (1936); *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 364-65 (1936); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893); *Miller v. United States*, 620 F.2d 812, 837 (Ct. Cl. 1980); *American-Hawaiian Steamship Co. v. United States*, 124 F.Supp. 378, 382-83 (Ct. Cl. 1954), *cert. denied*, 350 U.S. 863 (1955); *Hudson Navigation Co. v. United States*, 57 Ct. Cl. 411, 415 (1922). This Court, in the seminal *Monongahela Navigation Co.* case, explained the fundamental constitutional defect of a statutory limit on just compensation:

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

148 U.S. at 327. The Utility Parties submit that the rule of *Monongahela* is as sound today as it was in

1893, and urge the Court to reaffirm this important principle.[16]

B. The Opportunity for Limited Judicial Review of FCC Rate Orders Does Not Correct the Constitutional Infirmity of the Act.

Appellants seek to uphold the Act based on the availability of limited appellate review of FCC rate orders, stating that this satisfies the constitutional requirement of a judicial determination of just compensation. However, judicial review of the FCC's pole attachment rate decisions generally is limited to assessing the Commission's compliance with Congress' formula, and is limited to an administrative record containing only evidence related to the elements of the Act's statutory formula. The Act does not even purport to establish just compensation. Appellate review of such a narrowly constricted record fails to permit the judicial inquiry into just compensation mandated by the Constitution.[17]

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[16] The origins of the just compensation clause lie in a distrust by the Framers of colonial legislatures, which regularly took private property without compensating the owner. For example, many colonies took private land to build public roads without compensation, and goods of all types were impressed for military uses without payment. *See* Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 698 (1985). The fifth amendment was established to protect against these perceived legislative excesses. The protections offered by the just compensation clause, however, would be illusory if the legislature could set the rule of compensation for property that has been taken.

[17] Significantly, none of the cases cited by the appellants in support of their argument involved the kind of limited judicial review of a narrowly constricted administrative record involved

Appellate review of FCC pole attachment rate orders under the Administrative Procedure Act (5 U.S.C. § 706) is limited to consideration of the record developed before the Commission. "The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 105 S.Ct. 1598, 1607 (1985). This Court has repeatedly stressed the limited scope of judicial review of agency decisions. *See, e.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 103 S.Ct. 2856 (1983).

The evidence considered by the FCC in pole attachment proceedings is only that evidence which the FCC deems relevant to its application of the "binding rule" in the Act.[18] The ratemaking formula in the Act

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in this case. *Bauman v. Ross*, 167 U.S. 548 (1897); and *United States v. Jones*, 109 U.S. 513, address seventh amendment issues only. *United States v. Commodities Trading Corp., supra*, was an appeal from the Court of Claims which had conducted a full, unrestricted inquiry into the issue of what constituted just compensation. In *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), the Court recognized the availability of a Tucker Act claim against the United States—a proceeding that also presents an opportunity for an unrestricted determination of just compensation.

[18] The government argues that the Eleventh Circuit could have cured inadequacies in the record by permitting the introduction of new evidence at the appellate level. Brief for the Federal Appellants at 28, citing *American Trucking Ass'n v. United States*, 344 U.S. 298, 320 (1953). This is a novel and erroneous concept. The Court's reference to the introduction of new evidence in *American Trucking Ass'n* pertained to the ability of a federal district court to hear new evidence, not a court of appeals. A court of appeals, by its nature, is not well equipped to conduct evidentiary hearings or to make findings of fact.

thus binds the reviewing court, which reviews the FCC's compliance with the statutory mandate in implementing the formula.[19] The Pole Attachment Act requires the FCC to consider evidence in pole attachment rate cases only concerning the elements of the statutory formula. Judicial review on the basis of such a truncated record is merely an assessment of the FCC's compliance with the Congressional formula, and perpetuates the Act's constitutional defect of circumscribing the ultimate judicial determination of just compensation.[20] *See Northern Pipeline Construction*

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[19] Significantly, in both the *Alabama Power Co.* and *Texas Power & Light Co.* cases the courts of appeal found that the FCC had arbitrarily exceeded even the Congressional formula for setting rates.

[20] The cable interests suggest that the Act is constitutional, notwithstanding the inadequacy of judicial review of an administrative record limited to the statutory formula, on the basis of the alleged ability of utilities to obtain just compensation from the Claims Court under the Tucker Act, 28 U.S.C. § 1491 (1982). Brief for Appellants at 37, n.79. Notably, the government declined to support the Act's constitutionality by reference to the Tucker Act. Brief for the Federal Appellants at 27, n.33. The reliance of the cable companies on the Tucker Act is misplaced.

The structure of the Pole Attachment Act and its legislative history require the inference that Congress withdrew Tucker Act jurisdiction with respect to pole attachment rates. The Act broadly specifies that "the Commission shall regulate the rates, terms and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). The only exception to the FCC's regulatory authority over pole attachment rates is "where such matters are regulated by a State." 47 U.S.C. § 224(c)(1). Tucker Act jurisdiction over pole attachment rates is inconsistent with the structure and purposes of the Pole Attachment Act. The statute's approach to setting pole attachment rates is based upon an

Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86 n.39. (1982) (plurality opinion).

C. The Pole Attachment Act's Usurpation of the Judiciary's Power to Ultimately Determine Just Compensation for a Taking of Property Violates Article III.

The Eleventh Circuit correctly held that the Pole Attachment Act effectively prevents the Judiciary from ultimately determining the measure of just compensation for a taking of property under the fifth amendment. Implicit in the Eleventh Circuit's decision is the recognition that by prescribing a binding rule for fixing pole attachment rates, the Pole Attachment Act prevents an Article III court from ultimately determining what constitutes just compensation for a

allocation of costs which change over time, and the rate established may vary significantly from year to year. Accordingly, the amount that the utility would be entitled to recover under the Tucker Act would similarly vary from year to year. To hold that utilities must resort to the Tucker Act for just compensation would result in an annual ritual whereby the utility would first go to the FCC for a determination of its statutory rights for that year, then (several years later, after exhausting agency and judicial review of the Common Carrier Bureau's decision) go to the Claims Court for its constitutional entitlement for that year. Nor could this process be avoided by the award of a one-time fee as compensation for the taking for all future years. Because cable operators are constantly attaching to new poles as they expand their systems, utilities would be forced periodically to trek to the FCC and the Claims Court for determinations of their statutory and constitutional entitlements for the newly taken pole space. Such a procedure is a plainly inadequate remedy in light of the relatively small amounts of money involved for any given cable system in any particular year and would amount to a deprivation of due process.

taking of private property.[21] This offends the principle of separation of powers and is a violation of Article III.

The Framers of the Constitution recognized that "[t]he accumulation of all powers legislative, executive, and judiciary in the same hands... may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). To ensure against such tyranny, the Framers established three distinct branches of the federal government. This Court has consistantly held that "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

Article III establishes a broad policy that federal judicial power shall be vested in the judicial branch of government, whose independent judges enjoy life tenure and fixed compensation. "As an inseparable element of the constitutional system of checks and

[21] In their brief, Federal Appellants argue that if the Eleventh Circuit meant to limit consideration of just compensation claims to Article III courts, then it was rejecting the longstanding jurisdiction of the Claims Court (an Article I court) to consider issues of just compensation. Brief for Federal Appellants at 23. This is not the case. The Utility Parties are not challenging Congress' authority under Article I to vest some decision-making related to just compensation in tribunals such as the Claims Court that lack the attributes of Article III courts. The Claims Court, however, is not restricted by Congress concerning the evidence it may consider in determining just compensation. In contrast, the Pole Attachment Act's binding formula limits the FCC's decision-making powers, as well as the subsequent judicial review.

balances, and as a guarantee of judicial impartiality, Article III both defines the power and protects the independence of the judicial branches." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982). *See also Thomas v. Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325 (1985).

In substance, the Pole Attachment Act effectively prevents the judiciary from ultimately determining just compensation for property taken under the Act. By prescribing a binding rule for measuring compensation without judicial input Congress has appropriated for itself the task of determining just compensation. This it cannot do. The limited judicial review of this Congressional formula available under the Act does not preserve "the appropriate exercise of the judicial function." *Crowell v. Benson*, 285 U.S. 22, 54 (1932).[22] *See Northern Pipeline Construction Co.*, *supra*, at 86 n.39 (rejecting the view "that Art. III is satisfied so long as some degree of appellate review is provided"); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855).

* * *

In sum, the court of appeals correctly analyzed the taking issue in this case and applied the established precedents of this Court, as most recently stated in *Loretto*. In holding the binding formula of the Pole Attachment Act unconstitutional as a violation of the separation of powers principle, the Eleventh Circuit correctly and courageously applied principles lying at the heart of our Constitution.

[22] The Court in *Crowell* found that the requirement of *de novo* review as to certain facts was not "simply the question of due process in relation to notice and hearing," but was "rather a question of the appropriate maintenance of the federal judicial power." *Crowell v. Benson*, 285 U.S. at 56.

CONCLUSION

For these reasons, the Utility Parties respectfully urge that the decision below be affirmed.

Respectfully submitted,

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August 1986

(1) (6)

Nos. 85-1658 and 85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Appellants,
v.
FLORIDA POWER CORPORATION, et al.,
Appellees.

GROUP W. CABLE, INC., et al.,
Appellants,
v.
FLORIDA POWER CORPORATION, et al.,
Appellees.

On Appeal From The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF AND BRIEF OF NOR-WEST CABLE COMMUNICATIONS AND PREFERRED COMMUNICATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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On Appeal From The United States Court Of Appeals For The Eleventh Circuit

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MOTION OF NOR-WEST CABLE COMMUNICATIONS AND PREFERRED COMMUNICATIONS, INC. FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF

Nor-West Cable Communications and Preferred Communications, Inc. respectfully move for leave to file the attached *amici curiae* brief. The consent of the parties to this action was sought, but at this filing has not been received from all of them.

Nor-West Cable is a general partnership and Preferred Communications is a corporation, both of which have been organized for the purpose of disseminating news, information and entertainment, the former in the City of St. Paul, Minnesota, and the latter in the Watts area of the City of Los Angeles, California.

Both are presently in litigation with the respective cities where they seek to speak and publish concerning their right to obtain access to the necessary public utility facilities—poles and conduits—to operate a cable television system without the necessity of submitting to a municipal franchising process designed to select only a single company deemed "best" by local franchising authorities. (See *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986); *Nor-West Cable Communications v. City of St. Paul*, No. 85-5193 (8th Cir. 1986) [remanding to district court in light of *Preferred*].)

Nor-West Cable has a direct interest in this litigation.[1] Its ultimate vindication of its First Amendment right to speak and publish by means of cable television could well be aborted if it is nevertheless denied access to the necessary public utility services,

[1] Since the State of California has enacted legislation regulating the cost of pole attachment services (see Calif. Pub. Util. Code §767.5) the interests of Preferred Communications are not directly involved (see 47 U.S.C. §224(c)). The State of Minnesota, in contrast, has not enacted such legislation, and is therefore subject to the FCC's jurisdiction. (See FCC Public Notice, April 29, 1986 (Mimeo #4150)). Counsel for *amici* have been active in litigation concerning pole attachment problems in California and before the FCC, and Preferred Communication joins Nor-West Cable in this motion and the accompanying brief in order to make available to the Court the California experience with regard to the issues presented in this case.

even if it obtains a municipal license,[2] which could be the ultimate effect of an affirmance of the Court of Appeals' judgment in this case.

Amici have studied the jurisdictional statements and motions to affirm filed in this case, and have concluded that the parties have overlooked, or declined to set forth, fundamental facts which are central to the proper resolution of this litigation:[3] (1) the public utilities have, insofar as they are subject to the terms of 47 U.S.C. §224, *dedicated* their excess communications space to the use of cable television companies and (2) the provision of pole attachment services (as defined) to cable television companies is a *public utility service*. Once these facts are understood, the perceived "taking" problem disappears.

[2] *Amici* employ the term "license" as the most descriptive term for what local governments do with respect to cable television. (See 47 U.S.C. §522(8) ["franchise" means "a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system"].)

[3] What is here involved is *not* an incidental service occasionally supplied by the use of surplus facilities by one otherwise engaged as a public utility company; rather, at issue here is the provision of an essential service by a state protected monopolist using capital facilities which have been dedicated to that service by the Appellees for many years, i.e., a public utility service.

Accordingly, Nor-West Cable Communications and Preferred Communications, Inc., respectfully request leave to present their views on the issues raised by this litigation.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether § 6 of the Communications Act Amendments of 1978, Public Law 95-234, 92 Stat. 35, as amended, codified as 47 U.S.C. § 224, which regulates the rates that cable television operators can be charged for pole attachment services provided by those utilities which have dedicated their communications facilities for the attachment or placement of cable operators' wires to utility poles or in conduits, effects a taking under the Fifth Amendment, or is merely a standard police power regulation of public utility services provided by the use of utility assets dedicated to the provision of such services.

2. Whether that section violates the just compensation requirement of the Fifth Amendment because it empowers an administrative agency to regulate the rates for the provision of such public utility services.

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On Appeal From The United States Court Of Appeals For The Eleventh Circuit

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***AMICI CURIAE* BRIEF OF NOR-WEST CABLE COMMUNICATIONS AND PREFERRED COMMUNICATIONS, INC., IN SUPPORT OF APPELLANTS**

INTEREST OF *AMICI*

Amici are companies organized for the purpose of disseminating news, information and entertainment by means of cable television. In order to speak and publish by means of cable television, it is necessary

for them to obtain pole attachment services, i.e., access to the communication space of the local public utilities—normally the telephone utility—for the purpose of attaching their cables to poles or placing them in conduits on or in the public utilities' easements (obtained by the exercise of the power of eminent domain) on, over, under or alongside of public and private property.

Amici are presently in separate litigation concerning the right to operate a cable television system without the necessity of foregoing their First Amendment rights by submitting to a municipal franchising process designed to select only a single company deemed "best" by local franchising authorities and which imposes conditions which have nothing to do with the local government's legitimate police power concerns. (See *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986); *Nor-West Cable Communications v. City of St. Paul*, No. 85-5193 (8th Cir. 1986) [remanding to district court in light of *Preferred*].)

Amici are concerned that, once cable companies have vindicated their First Amendment right to access to the necessary public utility facilities free from unreasonable municipal restraints, cable companies generally, and Nor-West Cable in particular, may nevertheless be denied the right to speak and to publish by the public utilities themselves.[1]

[1] There is no such threat in California where the Legislature has explicitly found that private public utilities have dedicated their excess communications space to the use of cable television companies and that the provision of pole attachment services (as defined) is a public utility service. (See Cal. Pub. Util. Code §767.5.)

Pole attachments are defined as "any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." (47 U.S.C. §224(a)(4).) Thus, pole attachment services provided by utilities include not only the use of their poles, but use of all allied capital assets including their rights-of-way over both public and private property. (See, e.g., *Tex. Power & Light v. Federal Communications Com'n*, 784 F.2d 1265, 1272-73 (5th Cir. 1986).)

Without such services, most cable television companies could not operate, because of "the reluctance of most communities, based on environmental considerations, to allow an additional, duplicate set of poles to be placed." (H.R. Rep. No. 721, 95th Cong., 1st Sess. 2 (1977).) But, if the public utilities are held to have the right to dictate the price at which they are willing to provide their public utility services, then that "right" will include the right to deny those services at any price to all cable systems, or to limit the number of such systems to a favored one, despite the fact that those same utilities have previously dedicated the excess communications space of their facilities to the provision of pole attachment services to cable television companies.

As the history of the anticompetitive actions of telephone utilities and the increasing interest of power utilities to enter the cable television market demonstrate, these fears are neither imaginary nor remote. Accordingly, what is a stake here is the existence of an independant cable television industry.

SUMMARY OF ARGUMENT

1. The legislative history of 47 U.S.C. §224, particularly in light of the FCC's regulatory experience

with the anticompetitive actions of the telephone utilities against independant cable television companies which Congress addressed, demonstrates that §224 is predicated on the fact that Appellees and other utilities have *dedicated* their communications space to the provision of pole attachment services as a *public utility service*. This case, therefore, is governed by standard public utility principles, rather than by the private property principles relied on by the Court of Appeals below. Under applicable public utility principles, the FCC's regulation of the rates which Appellees charge for their public utility services does not constitute a "taking" within the meaning of the Fifth Amendment, particularly since Appellees have been provided an adequate judicial remedy for challenging any alleged arbitrary actions which might be taken by the FCC.

2. Should this Court hold that Appellees have a Fifth Amendment right to be free from regulation of their charges for an essential service for electronic publishing, then the First Amendment rights of independent cable television operators will be jeopardized. The public utilities' prior anticompetitive actions against an independent electronic publishing industry is well documented, and there is a strong likelihood that, given the power to charge confiscatory rates or to deny pole attachment services entirely, public utilities will be able to monopolize the electronic publishing industry, contrary to the public interest.

3. If the Court concludes the present record is insufficient to resolve this case on the basis of Appellees' dedication of their public utility facilities, then the case should be remanded to the Commission for development of a full factual record.

ARGUMENT

I. Since the FCC's Regulation of the Charges for Pole Attachment Services Affects Only Those Public Utilities which Have Dedicated Their Excess Communications Space for the Provision of such Public Utility Services to Cable Television Companies, There Is No "Taking" of such Space by such Regulation

Cable television companies are in the business of providing interstate communications services. (*United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-69 (1968).) As noted above, however, installation of cable television systems to provide such interstate services normally requires the use of existing intrastate utility facilities since local governments do not permit dual pole plants in their communities for environmental reasons. (H.R. Rep. No. 721, 95th Cong., 1st Sess. 2 (1977).) Consequently, almost universally cable companies are compelled to procure pole attachment services from the utilities which own or control the local pole and allied facilities acquired by the exercise of the utilities' eminent domain powers. (See Sen. Rep. No. 580, 95th Cong., 2d Sess. 13 (1978) ["there is often no practical alternative to a CATV system operator except to utilize available space on existing poles. The number of poles owned or controlled by cable companies is insignificant, estimated to be less than 10,000, as compared to the over 10 million utility-owned or controlled poles to which CATV lines are attached"].)

Virtually from the outset, there has been a conflict of interest between the utilities and independent cable television companies with respect to the use of the necessary utility facilities and the price for and the conditions imposed on that use demanded by the util-

ities. In March, 1977, after years of study, the FCC concluded it did not have jurisdiction to regulate the rates charged for pole attachment services, which had been sought by the cable television industry. (*California Water & Telephone Co.*, 64 F.C.C.2d 753 (1977).) In September, 1977, the Legislature of the State of California responded to the cable industry's problem in that state by enacting a statute (Cal. Stats. 1977, Chap. 954, § 1) which contained a legislative finding

> that many public utilities have, through a course of conduct covering many years, made available the surplus space on and in their poles, ducts, conduits, and other support structures for use by the cable television industry for pole attachment services, and that the provision of such pole attachment services by such public utilities is and has been a public utility service.

The Act provided (1) a procedure for determining the charges for pole attachment services "[w]henever a public utility and a cable television corporation are unable to agree upon the terms, conditions, or compensation for pole attachments," and (2) for regulation by the California Public Utilities Commission. While the Act did not contain an express finding that the utilities had dedicated their surplus space to such use, the specific findings that were made dictated that conclusion (see, e.g., *Yucaipa Water Co. No. 1 v. Public Utilities Com.*, 54 Cal.2d 823, 827-28, 9 Cal.Rptr. 239, 240-41, 357 P.2d 295, 296-97 (1960)) and that fact was clearly an underlying premise of the Act.

The California Act was followed only five months later by the Communications Act Amendments of

1978, Public Law 95-234, 92 Stat. 33, § 6 of which enacted 47 U.S.C. §224, in response to the FCC's conclusion that it lacked jurisdiction to regulate pole attachment services. This Act granted jurisdiction over intrastate communications common carriers with respect to pole attachment services. (Sen. Rep. No. 580, *supra*, at 3.) It was designed to counterbalance the adhesive bargaining power the utilities enjoyed because of their monopoly control of the essential means for cable operators to engage in interstate business. (*Ibid.*) Specifically, "Federal involvement in pole arrangements [was to] . . . serve two specific, interrelated purposes: To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." (*Id.* at 14.)

Congress was careful, however, to confine federal involvement to

> only where space on a utility pole has been *designated* and is actually being used for communications services by wire or cable. Thus, . . . if provision has been made for attachment of wire communications a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission. The underlying concept . . . is to assure that the communications space on utility poles created as a result of private agreement . . . be made available, at just and reasonable rates, and under just and reasonable terms and conditions, to CATV systems.

(*Id.* at 15 [emphasis added].) Thus, only those utilities which "participate in the provision of communications space on utility poles" (*ibid.*) are subject to the FCC's jurisidiction; the Act does not, for example, "require a power company to *dedicate* a portion of its pole plant to communications use." (*Id.* at 16 [emphasis added].) If such space has been dedicated, however, then the utility may not discontinue such service "solely to avoid [FCC] jurisdiction." (*Ibid.*)

The foregoing demonstrates that the FCC's jurisdiction is predicated on the *dedication* of communication space by the utilities for cable television companies. This jurisdictional premise is more explicitly and fully stated in subsequent California legislation. (See *Century Federal v. City of Palo Alto*, 579 F.Supp. 1553, 1564-65 (N.D. Cal. 1984).) Current Public Utilities Code 767.5(b), enacted in 1980 (see Cal. Stats. 1980, Chaps. 646, § 2, & 652, § 2.), provides:[2]

[2] "Support structure" is defined as including, but not limited to, "a utility pole, anchor, duct, conduit, manhole, or handhole"; "pole attachment" is defined as "any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure located on or in any right-of-way or easement owned, controlled, or used by a public utility"; "surplus space" is defined as "that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders or regulations of the [public utilities] commission, to allow its use by a cable television corporation for a pole attachment"; "excess capacity" is defined as the "volume or capacity in a duct, conduit, or support structure other than a utility pole or anchor which can be used, pursuant to the orders and regulations of the commission, for a pole attachment"; and "usable space" is defined as "the total distance between the top of the utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance." (Cal. Pub. Util. Code § 767.5(a)(3)-(6).)

> The Legislature finds and declares that public utilities have dedicated a portion of such support structures to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision of such pole attachments is a public utility service delivered by public utilities to cable television.
>
> The Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

What is explicit in California's legislation, is implicit in Congress' enactment of 47 U.S.C. §224, as the above exerpts from Senate Report No. 580 demonstrate. (See also 47 U.S.C. §541 [cable television "franchise shall be construed to authorize construction . . . over public rights-of-way, and through easements, which is [sic] within the area to be served . . . and which have been dedicated for compatible uses"].) Appellees and most other utilities have for years dedicated communications space on their facilities for the use of cable television companies, as the more than 10 million poles with attached television cables so eloquently demonstrate. (See Sen. Rep. No. 580, *supra*, at 13.)

Thus, the Court of Appeals below approached the constitutional question raised by Appellees with an incorrect set of premises. It accepted Appellees' characterization of the problem as one of involuntary and permanent use of their private property which, accordingly, was unconstitutional under the rationale of *Loretto v. Teleprompter-Manhattan CATV Corp.*, 458 U.S. 419 (1982). It found Appellants to be "unwanted guests" who have no right to overstay their welcome on the poles (*Florida Power Corp. v. F.C.C.*, 772 F.2d 1537, 1543 (11th Cir. 1985)) but who can not be dispossessed because of the FCC's rule that pole attachment services may not be discontinued to avoid FCC jurisdiction under 47 U.S.C.§224 (*id.* at 1544).

As shown above, however, that rule—*First Report and Order in CC Docket 78-144*, 68 F.C.C.2d 1585, 1589 (1978)—was *intended* by Congress (Sen. Rep. No. 580, *supra*, at 16), because of the prior dedication of communications space for pole attachment services to cable television companies. The "burden" to continue such services, unless permitted to discontinue them by the appropriate regulatory authority, is simply a standard condition of assuming the responsibility of providing public utility services. (See, e.g., *Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330, 332 (1925); *Broad River Power Co. v. State of South Carolina ex rel. Daniel*, 281 U.S. 537, 543-44 (1930); *Alabama Public Service Com'n v. Southern R. Co.*, 341 U.S. 341, 352-53 (1951) [Frankfurter, J., concurring].)

Appellees are unlike the private trucker in *Michigan Public Utilities Com'n v. Duke*, 266 U.S. 570, 576 (1925) who

> has no power of eminent domain or franchise under the state, and no greater right to use the highways than any other member of the body public. He does not undertake to carry for the public, and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others. The public is not dependent on him or the use of his property for service, and has no right to call on him for transportation. . . .

On the contrary, Appellees satisfy all of the conditions found wanting in *Duke*. But, even if they didn't, Congress' imposition of control by the FCC over their rates for pole attachment services does not constitute a "taking" of Appellees' property. (See, e.g., *Nebbia v. New York*, 291 U.S. 502, 535-37 (1934); *Fordham Bus Corporation v. United States*, 41 F.Supp. 712, 715 (S.D. N.Y. 1941) [3-judge court].) Nor is the judicial review of the FCC's determinations provided by the Act so toothless as to afford Appellees no protection from arbitrary administrative action. (See, e.g., *Alabama Power Co. v. F.C.C.*, 773 F.2d 362, 372 (D.C. Cir. 1985); *Tex. Power & Light v. Federal Communications Com'n*, *supra*, 784 F.2d at 1275.) Accordingly, the judgment of the Eleventh Circuit should be reversed.

II. The Effect of Holding that Utilities Are Free from Federal Regulation of Their Rates and Conditions for Pole Attachment Services for Cable Television Will Be To Restrain the Right To Speak and Publish by Means of Cable and Will Grant Utilities a Monopoly Stranglehold on Electronic Publishing, Contrary to the Public Interest

The Court of Appeals below focused exclusively on Appellees' property rights and ignored the potential

consequences for the First Amendment rights of cable television operators and the potential economic and technological consequences for the public.

"The issue of the handling of the electronic media is the salient free speech problem of this decade." (Pool, *Technologies of Freedom* 10 (1983).) It is vitally important to keep access to this technology open, and not permit the utilities who own or control an essential gateway to entering the electronic publishing market to dominate that market. (See, e.g., *General Telephone Co. of Cal. v. F.C.C.*, 413 F.2d 390, 397, 401 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1969) [FCC's power to compel telephone utilities to obtain § 214 certificates before constructing cable systems for channel lease service to cable operators upheld]; *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 857 (5th Cir. 1971) [FCC's power to compel telephone utilities to offer the option of pole attachment services to cable television operators so as to allow them to build their own systems upheld]; *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131, 180-86 (D.C. D.C. 1982) [barring telephone utilities from electronic publishing field for period of time sufficient to permit healthy development of electronic publishing industry], *affirmed sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).)[3]

[3] While it has normally been telephone utilities which have sought to control the development of cable television, power utilities have also begun entering the cable television market. (See, e.g., York & Malko, *Utility Diversification: A Regulatory Perspective*, 111 Pub. Util. Fortnightly, No. 1, p. 15, 20 (1983) [announcing seminars for *power utilities* on the advantages of diversifying by entering cable television market]; The Wall Street Journal, February 15, 1986, p. 5, col. 1 [noting *power utilities'* increasing diversification by going into the cable television business].)

There is a well documented history of anticompetitive conduct of the telephone utilities with respect to cable television companies. (See, e.g., *Telecable Corporation*, 19 F.C.C.2d 574 (1969); *Dimension Cable TV*, 25 F.C.C.2d 520 (1970); *Manatee Cablevision, Inc.*, 22 F.C.C. 2d 841 (1970); *Better TV of Dutchess County v. New York Telephone*, 31 F.C.C.2d 939 (1971); see also *TV Signal Co. of Aberdeen v. American Telephone & T. Co.*, 462 F.2d 1256 (8th Cir. 1972), and *TV Signal Co. of Aberdeen v. Am. Tel. & Tel.*, 617 F.2d 1302 (8th Cir. 1980), concerning the antitrust implications of the telephone utilities' one-attachment-per-pole policy predicated on an alleged concern for the technical integrity of the communications networks.) This experience led to the adoption of rules barring telephone utilities from owning and operating cable television systems within their service areas (see 47 CFR §63.54) and requiring telephone utilities to give cable companies the option of pole attachment services so as to allow them to construct their own cable television systems rather than being limited to leasing channels on systems built by the pole-owning utilities (see 47 CFR §63.57). (*Section 214 Certificates*, 21 F.C.C.2d 307 (1970), *affirmed*, *General Telephone Co. of Southwest v. United States*, *supra*.) The FCC concluded:

> The entry by a telephone company, directly or through an affiliate, into the retailing aspects of CATV service in the community within which it furnishes communications services can lead to undesirable consequences. This is because of the *monopoly position* of the telephone company in the

community, as a result of which it has *effective control* of the pole lines (and conduit space) required for the construction and operation of CATV systems. Hence, the telephone company is in an effective position to preempt the market for this service which, at present, is essentially a monopoly service in most population centers. *It can accomplish this by favoring its own or affiliated interest as against nonaffiliate interests in providing access to those pole lines or conduits. . . .*

(*Section 214 Certificates, supra,* 22 F.C.C.2d at 324 [emphasis added].) Also of interest is the fact that in those proceedings the Justice Department (1) argued that "the telephone companies have been seeking to extend their regulated telephone monopoly into areas of CATV and broadband coaxial cable, primarily to assure themselves of control over the services broadband coaxial cable will perform in the future" (*id.* at 324); (2) expressed the belief "that there is a serious danger that the existing local monopoly position of telephone companies as communications common carriers may prevent the development of an independent CATV industry"; and (3) not only advocated the restrictions adopted by the FCC, but also felt the FCC should "prohibit the telephone companies from restricting a CATV operator's use of cables, except as shown to be necessary to protect the technical integrity of the communications network" (*id.* at 314).

Prior to the proceedings in *General Telephone Co. of Cal. v. F.C.C., supra,* pole attachment agreements routinely contained extensive prescriptions on the services that the cable television company was allowed to provide. Many of these anticompetitive tactics were

abandoned by the utilities after the various unfavorable rulings of the FCC outlined above. However, during the early 1970's the pole-owning utilities—having lost their ability to force leased channel services on independent cable television operators by the devices of denying or delaying pole attachment service, and no longer being able to contain the threat of future competition by the insertion of anticompetitive terms into pole attachment agreements—responded by attempting confiscatory increases in pole attachment rates. These new efforts were resisted at the FCC until that agency concluded that it lacked statutory authority to regulate pole attachment services. (*California Water & Telephone Co., supra.*) That development, in turn, led to the enactment of 47 U.S.C. §224, which is the focus of this litigation.[4]

When §224 and its implementing regulations are judged in their proper historical and regulatory context, it is clear that they implicate far more than Appellees' alleged private property rights. They impact equally, if not far more significantly, on both

[4] By enacting §224, Congress undertook to ensure that the telephone utilities, which possess a monopoly over an essential communications pathway, will provide access to that pathway on reasonable terms and conditions. By placing §224 in that part of the Communications Act devoted to communications common carriers, moreover, Congress made clear its intent that pole attachments would be made freely available without discrimination. Nothing in §224, nor the the FCC's implementing regulations (47 CFR 1.1401-1 et seq.), authorizes a utility to impose extraneous preconditions on a cable television company's right of access to those poles. To the contrary, as shown above, §224 contemplates that where a utility has dedicated communications space for pole attachments, it must continue to do so on reasonable terms and conditions.

the First Amendment rights of cable television operators and the public's interest in the free and full development of the electronic publishing industry. For, if Appellees may freely regulate the use of an essential pathway to electronic publishing, they will be able to—and history strongly suggests they will—deny that means to any and all who pose a competitive threat to their dominance, if not their monopolization, of electronic publishing.

It would be ironic, indeed, if these regulated local common carriers, whose position as gatekeepers of the right to enter the electronic publishing market was acquired by the exercise of the eminent domain power in the name of the public's interest, are able to achieve indirectly, because of their asserted private property rights in their public utility facilities, what this Court has prevented them or others from achieving directly. (See, e.g., *United States v. American Tel. & Tel. Co., supra; City of Los Angeles v. Preferred Communications Inc., supra.*)

III. Should the Court Conclude It Has an Insufficient Factual Record To Hold that Appellees' Public Utility Facilities Have Been Dedicated to the Provision of Pole Attachment Services, It Should Remand the Case to the Commission To Establish a Satisfactory Record

Although the FCC's selected method of handling pole rate cases on the basis of a written record has to date had the effect of presenting a reviewing court with a paucity of background facts, *Amici* nevertheless believe that their previous outline of the legislative record regarding the jurisdictional basis for 47 U.S.C. §224, combined with the undeniable fact that virtually all cable television services are provided by

means of the use of pole attachment services on utility-owned poles, is sufficient to justify this Court's resolution of this Fifth Amendment case on the basis of Appellees' dedication of their public utility facilities for the provision of public utility services, i.e., pole attachment services. (See, e.g., *City of Los Angeles v. Preferred Communications, Inc., supra*, 106 S.Ct. at 2038; *Vance v. Bradley*, 440 U.S. 93, 110-11 (1979).)

If the Court entertains doubts about the jurisdictional basis for §224, however, it should order this case remanded to the Commission for the development of a full factual record. In this connection, the Court should be aware that there is presently pending before the FCC an unresolved Petition for Declaratory Ruling, for Rule Making, and for Institution of §403 Inquiry filed to determine the regulatory basis for its regulation of the rates and conditions for pole attachment services. (See *In re the Matter of Maintaining Cable Television's Open Access to Poles and Conduits Owned or Controlled by Telephone Companies*, F.C.C. Public Notice, Report No. D-219, April 18, 1984.)

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals below should be reversed or the case should be remanded to the FCC for development of a full factual record regarding the jurisdictional basis of 47 U.S.C. §224.

Respectfully submitted,

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(8)

No. 85-1658

In The

Supreme Court of the United States

October Term, 1985

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FEDERAL COMMUNICATIONS COMMISSION
AND
UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

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On Appeal from the United States Court of Appeals for the Eleventh Circuit

---o---

BRIEF OF TEXAS CABLE TV ASSOCIATION, INC., ET AL. AS AMICI CURIAE

---o---

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QUESTIONS PRESENTED

1. Regulated public utilities charge rent to cable television operators who attach cable television facilities to utility poles. May Congress empower an administrative agency, subject to judicial review, to control those rents?

2. Is the regulation of rates which utilities may charge for use of property already dedicated to public service a "taking" under the Constitution?

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BRIEF OF TEXAS CABLE TV ASSOCIATION, INC., ET AL. AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The Texas, Virginia, Georgia, North Carolina and California Cable Television Associations are trade associations representing cable television operators in their respective states. Continental Cablevision, Inc.; Daniels & Associates, Inc.; Rogers Cablesystems, Inc.; Times Mirror Cable Television, Inc.; TeleCable Corporation; United Artists Cablesystems Corporation; and United Cable Television Corporation are cable television operators providing cable service throughout the nation. Together the amici represent cable systems serving more than 12 million subscribing households. The Associations and the operators are all parties to and/or vitally interested in proceedings presently pending before the Federal Communications Commission under the statute held unconstitutional by the Court below. All of the operators presently attach cable facilities to utility poles at rates which have been established with reference to the statutory guidelines.

The Eleventh Circuit has held, *sua sponte,* that Congress and its federal agencies are constitutionally forbidden to regulate the rates which public utilities charge for attaching cable television lines to utility poles. It held, based upon an 1893 case, that only courts may set such rates. The Eleventh Circuit's archaic ruling is inconsistent with current Supreme Court precedent; imperils the cable communications market; and repudiates the long-accepted principles under which Congress and its agencies regulate the modern economy.

The amici will be vitally affected by the outcome of this case. We urge this Court to reverse the Eleventh Circuit decision.[1]

STATEMENT OF THE CASE

The Public Interest In Pole Attachment Regulation

Until Congress passed the Pole Attachment Act in 1978, the progress of cable television faced an intractable, nationwide obstacle. Cable operators, seeking to serve television households without violating public and municipal antipathy to duplicative pole lines, sought to rent surplus space to string cable television facilities on existing utility poles.[2] They were faced with the predatory pricing of telephone companies hostile to the independent ownership of a competitive technology.[3] With the complicity of power companies, with whom the telephone companies owned or administered virtually all of the available poles, the telephone companies drained cable

[1]Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this Brief. Their letters of consent have been filed with the Clerk of the Court.

[2]"Use is made of existing poles rather than newly placed poles due to the reluctance of most communities based on environmental considerations, to allow an additional, duplicate set of poles to be placed." H. R. Rep. No. 721, 95th Cong., 1st Sess. 3 (1977).

[3]Section 214 Certificates, 21 F.C.C.2d 307, 316, *modified,* 22 F.C.C.2d 746 (1970), *aff'd sub nom.* General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971).

operators with unjustified pole rent increases.[4] Those poles had been set in public rights-of-way, or in easements obtained with the backing of public law, to deliver public services. Congress found that utilities, who enjoyed their monopoly positions only through government intervention, were standing in the gateway of commerce, abusing their public trust and frustrating the public interest in the development of the communications marketplace.[5] Antitrust remedies, while they existed, were slow, expensive, and therefore ineffective.[6]

FCC Pole Attachment Rent Control

Congress remedied the wrongs of the utilities with the Pole Attachment Act.[7] It charged the Federal Com-

[4]Manatee Cablevision, Inc., 22 F.C.C.2d 841, 849 (1970), *vacated as moot,* 35 F.C.C.2d 639 (1972); TeleCable Corp., 19 F.C.C.2d 574, 578-79, 587 (1969); United Tel. Co. of Pennsylvania, 40 F.C.C.2d 359, 361 (1973); Radio Hanover, Inc. v. United Utils., Inc., 273 F. Supp. 709 (M.D. Pa. 1967).

[5]The Act's sponsor explained: "These utilities, however, have responded in traditional monopolistic fashion, offering cable operators 'take it or leave it' terms. Not only does this situation hamper the expansion of cable television service, but in at least one instance, it resulted in ongoing cable service being cut off to consumers. . . . [C]onsumers now receiving cable television as well as consumers who desire access to this service in the future will benefit from this bill's attempt to protect them from the abusive monopoly power of the utilities." 123 Cong. Rec. 16694 (1977) (statement of Rep. Wirth).

[6]After 11 years of litigation, Northwestern Bell Telephone's pole attachment pricing and practices were held to violate the Sherman Act, but by then the cable operator was out of business. TV Signal Co. of Aberdeen v. AT&T Co., 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D. March 13, 1981).

[7]47 U.S.C.A. § 224 (West Supp. 1985).

munications Commission ("FCC") with the duty to set "just and reasonable" rates for attachment space on poles, once the space is offered by utilities.[8] The rates are to be set within statutory guidelines which assure the utility of at least cost recovery, based on avoidable costs, and at most rates as they might be calculated by a public service commission, based on fully distributed costs.[9] In practice, the FCC has established pole attachment rates on fully distributed costs which assure utilities of a reasonable rate of return. Under standard utility accounting practice, regulated utilities are guaranteed non-confiscatory rates of return on their pole investments.[10] The FCC merely defines which costs of pole plant already dedicated to public service will be recovered from cable operators. All remaining costs are recovered from ratepayers.

The Commission also permits utilities a standard contractual requirement that the cable operator purchase taller replacement poles (and continue to pay rent) whenever the utilities need to use the attachment space rented to cable operators.[11] The utilities are not only fully com-

[8]"Federal involvement in pole attachment matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable . . . as a result of private agreement . . . ." S. Rep. No. 580, 95th Cong., 1st Sess. 15 (1977).

[9]47 US.C.A. § 224(d) (West Supp. 1985).

[10]Those public service commissions which account for rents from cable television operators treat them as reductions in a utility's revenue requirement. Regardless of the amount of pole rents collected, all public service commissions must set revenue requirements from ratepayers at levels which assure a nonconfiscatory return on regulated property.

[11]Cable Television Pole Attachment Rate Formula, 56 Rad. Reg. 2d (P&F) 707, 710 (1984).

pensated for the space rented to cable, but are provided identical replacement space if their needs increase.

Under Commission regulation, cable operators and utilities may secure swift and expert resolution of pole disputes. Unlike judicial remedies, FCC procedures do not cost the parties or the public more to process than is at stake in most of the rent disputes. The FCC also offers consistent resolution of the rent disputes which may arise in any of the 18,500 franchise areas served by cable. Now that the Commission has developed consistent methods for rate setting, it has become commonplace in the cable and utilities industries to reach statewide settlements using the FCC rate methodology. For example, the rental rates for all Bell telephone poles rented to each Texas cable operator are routinely adjusted annually under the FCC formula, in consultation with the state cable television trade association, without the need for Commission involvement. The same is done for power poles rented to cable operators in Georgia. State authorities which regulate pole rentals also rely heavily on federal example. In California, the state pole rental statute imports key elements of the FCC formula, as does New York law.[12]

Judicial Control of FCC Rate Orders

The FCC's orders are enforced only through the Justice Department in federal district court.[13] FCC orders to which utilities or cable operators object may be appealed directly from the FCC to the U.S. Courts of

[12]Cal. Pub. Util. Code § 767.5 (Deerings Supp. 1985); N.Y. Pub. Serv. Law § 119-a (McKinney 1986).

[13]47 U.S.C.A. § 401(b) (West 1962).

Appeal, which have already proven themselves capable of rigorous analysis of the FCC's methods of calculating just and reasonable rates.[14] Any constitutional deficiency in the compensation is also subject to Tucker Act review in the U.S. Claims Court.[15] By referring these pole rental disputes for expert agency resolution in the first instance, Congress has assured the swift removal of market impediments without clogging the already backlogged courts.

SUMMARY OF ARGUMENT

In holding Congress and its administrative agencies powerless to impose administrative price controls, the Eleventh Circuit has reverted to archaic princples. Agencies have long been permitted to regulate rates for use of property affected with a public interest, subject to judicial review. By removing such regulatory authority exclusively to the courts, the Eleventh Circuit has shifted economic regulation to the already burdened courts, and undermined the foundation of utility regulation and much of the New Deal.

Such judicial activism is not constitutionally compelled. In this case, Congress regulates the rates charged by utilities for pole attachments because the utilities had

[14]47 U.S.C.A. § 402(b) (West 1962); Texas Power & Light Co. v. FCC, 784 F.2d 1265 (5th Cir. 1986); Alabama Power Co. v. FCC, 773 F.2d 362 (D.C. Cir. 1985).

[15]28 U.S.C.A. § 1491 (West Supp. 1985); Thomas v. Union Carbide, 105 S. Ct. 3325 (1985); Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

abused the monopoly power given them as a public trust. All of the affected utility property—its distribution plant and the entirety of each pole—is already dedicated to public service, is included in the utility's rate base, and is guaranteed a nonconfiscatory return. The utilities are guaranteed perpetual use of the space rented to cable operators, under contracts which permit the utilities to recapture the space as needed. If, for some reason, this long-accepted scheme of rate regulation constitutes a "taking," Congress has assured just compensation. While the FCC sets the rates in the first instance, that compensation is subject to exacting judicial review and Tucker Act review for any constitutional deficiencies. The legality of comparable legislative action has been upheld by this Court, the D.C. Circuit, and the New York Court of Appeals. The Eleventh Circuit's contrary decision is an anachronism and must be reversed.

ARGUMENT

Consequences of the Eleventh Circuit Decision

The Eleventh Circuit Court of Appeals has *sua sponte* held that it is constitutionally impermissible for Congress or an administrative agency to regulate pole rents.[16] The Circuit Court drew on this Court's holding in *Loretto*, which found a "taking" when a state permitted a cable operator to lay cable permanently on the property

[16]Florida Power Corp. v. FCC, 772 F.2d 1537, 1545 (11th Cir. 1985).

of an unwilling landlord.[17] From that narrow holding, the Eleventh Circuit found a "taking" in Congress' regulation of the attachment rates which heavily regulated public utilities, guaranteed a rate of return, may charge to cable television operators. Then, principally in reliance upon an 1893 case which has long been repudiated by the Court,[18] the Eleventh Circuit held that only a court could set the compensation due the utilities.[19]

The Eleventh Circuit has made the narrow holding of *Loretto* swallow one hundred years of economic regulation. This Court has long upheld the legislature's right to subordinate property rights to the public interest in administrative price controls.[20] If agencies were powerless to set rates wherever physical occupation is deemed to occur, then the already backlogged courts would be swamped with compensation claims whenever a railroad hauls freight; or a public service commission orders power

[17]Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[18]The Circuit Court relied on Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), the case which was relied upon by the losing parties in the rent control case and the rail reorganization case. Brief for Defendant in error at 29, Block v. Hirsh, 256 U.S. 135 (1921) (rejected by Court at 157, relying upon Munn); Brief for Appellee, Penn Central Co. at 54, 58, Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) (rejected by Justices Brennan, Blackmun, Marshall, Powell, Rehnquist, and White at 149, relying on Tucker Act).

[19]772 F.2d at 1545.

[20]Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 395-400 (1940) (coal prices); Nebbia v. New York, 291 U.S. 502 (1934) (milk prices).

companies to interconnect facilities; or the FCC orders communications carriers to interconnect; or a legislature establishes rent control. All of these involve physical occupation of property, be it utility property or private property affected with a public interest. Yet they have all been upheld as legitimate forms of economic regulation,[21] now made suspect by the decision on appeal.

The Court's ruling will frustrate any Congressional regulation in the public interest wherever physical occupation is deemed to occur. Under the Eleventh Circuit's view, taking will become the new substantive due process, the new non-delegation doctrine—activist doctrines widely reported to be "dead in the federal courts."[22] It would shift the burden of economic regulation from Congress and its agencies to the judiciary, at a time when this Court and this Administration has called on Congress to relieve federal judges of the growing "judicial deficit" of backlogged cases.[23] Such a rebirth of "economic civil rights"

[21]In Gainesville Utils. Dept. v. FPC, 402 U.S. 515, 528 (1971), for example, the Court held that the FPC may order physical interconnection of power companies and that Congress may "commit judgment of what compensation is reasonably due, in this highly technical field, to the Commission." To the same effect is American Paper Inst., Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402 (1983). The same holding applies to communications carriers. MCI Telecommunications Corp. v. FCC, 580 F.2d 590 (D.C. Cir.), *cert. denied,* 439 U.S. 980 (1978). Bell Tel. Co. of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975).

[22]1 Davis, Administrative Law Treatise § 3.10, at 187 (2d ed. 1978).

[23]*See, e.g.,* Chief Justice Burger, 1985 Year-End Report on the Judiciary 3-4; J. Rose and D. Karp (Department of Justice), *Congress' Inaction to Blame for Federal Court Backlog,* Legal Times, January 23, 1984 at 14, col. 1 (encouraging greater reliance on agencies to resolve disputes with "some degree of Article III review").

has been recommended by some academics; but even they admit that the view is a radical departure from modern jurisprudence, which would repeal the New Deal; and even they would not extend their activism to dismantle utility regulation.[24]

Constitutionality of Administrative Rate Regulation

The Eleventh Circuit's emasculation of Congressional power is nowhere compelled by the Constitution. The constitutionality of Congress' use of remedial rent control has long been upheld. Justice Holmes, for example, upheld state and federal rent and eviction control. "If the public interest be established," he wrote, "the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn v. Illinois*, 94 U.S. 113, 24 L. Ed. 77." *Block v. Hirsh*, 256 U.S. 135, 257 (1921). On that cornerstone, the structure of modern economic regulation has been built.

Utilities have developed and enjoyed monopoly control of poles and rights-of-way solely because of government intervention. Utilities were granted the powers of eminent domain as a public use and assured the privilege of protected markets as a public trust. Congress is fully empowered, if not obligated, to prevent the utilities' abuse of that governmentally-created market power and to protect the communications marketplace. As the Court noted this year in upholding a rent control ordinance, "the

[24]R. Epstein, Takings: Private Property and the Power of Eminent Domain 274, 281 (1985).

function of government may often be to tamper with free markets, correcting their failures and aiding their victims . . . ."[25] Faced with the public need for swift control of predatory rate increases by monopoly public utilities, Congress charged the FCC with controlling pole attachment rates. We do not believe that Congress' scheme of pole attachment regulation is a "taking," anymore than is rent control, or was the control of rates charged for grain elevator space in *Munn*. This is particularly so because (1) the utilities are renting poles which are *already* dedicated to public service and embedded in the rate base, and are therefore guaranteed their authorized rates of return;[26] and (2) the utilities are never permanently displaced from use of the pole space they willingly rent to cable operators.[27]

But if some regulatory line has been crossed, and the Pole Attachment Act constitutes a "taking," there is nothing in modern law incapacitating Congress from using agencies in the first instance to set compensation,

[25]Fisher v. City of Berkeley, 106 S. Ct. 1045, 1048 (1986).

[26]Fifth Amendment takings claims by utilities have long been rejected where regulated rates are set at just and reasonable levels. FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944). The regulation of utility rates assures a nonconfiscatory return. *See* note 10 and Kansas City Power & Light Co. v. State Corp. Comm'n, No. 58293 (Kan. Feb. 21, 1986).

[27]*Loretto* found a taking only where cable had been granted uninvited "permanent physical occupation" of property, to the exclusion of its owner. 458 U.S. at 435-36. Utilities have voluntarily rented pole space, and are guaranteed the right to recover the space rented to cable if their own needs increase. *See* note 11.

where the amount may be tested under the Tucker Act and in judicial review. In upholding the Rail Reorganization Act of 1973, for example, this Court made clear that Congress could not only take title to the properties of northeast corridor railroads, but could specify the form of compensation, and could establish an independent agency to set its amount.[28] The Court rejected the railroads' constitutional demands for a court trial, holding that the Tucker Act remedy alone cured any constitutional question which might arise in the administrative proceedings.

The legality of comparable procedures in cable regulation has been assumed by respected courts. On remand from *Loretto,* the New York Court of Appeals upheld state procedures permitting administrative determination of just compensation, subject to judicial review.[29] The U.S. Court of Appeals for the District of Columbia Circuit has assumed that if the Pole Attachment Act constituted a taking, then the Commission's scheme of rate setting assures just compensation.[30] The Eleventh Circuit's ruling to the contrary is archaic.

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[28]419 U.S. at 149-54.

[29]Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 153, 446 N.E.2d 428, 434, 459 N.Y.S.2d 743, 749 (1983).

[30]Alabama Power Co. v. FCC, 773 F.2d at 367 n.8.

CONCLUSION

The need for the Supreme Court to address the Eleventh Circuit's anomalous ruling can hardly be overstated. Congress has every right to protect the communications marketplace from the overreaching of regulated monopolists. Unless the Eleventh Circuit is reversed, Congress will be unable to regulate the modern economy without initiating district court action each time regulations are applied.

For these reasons, this Court should reverse the judgment below.

Respectfully submitted,

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July 28, 1986

Nos. 85-1658 and 85-1660

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On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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On Appeal from the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

INTEREST OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellees. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. An independent Board of Trustees authorizes participation in a case only when it concludes that PLF's position has broad public support. The Board of Trustees has authorized the filing of this brief.

PLF believes that clear standards for determining what constitutes a "taking" will benefit property owners, regulatory agencies, and the courts alike. When people know with certainty what their rights are, and what the rules are, disputes can be resolved outside of the courtroom. In very recent years this Court has issued certain opinions, including *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which go a long way towards clarifying the law in this area. PLF believes it is in the public interest to preserve these precedents without qualification or equivocacy.

PLF's public policy perspective in support of private property rights will help provide this Court with a more complete briefing of the interests at stake in this litigation.

SUMMARY OF THE ARGUMENT

Although the facts of this case differ from *Loretto v. Teleprompter Manhattan CATV Corp.*, in that the cable attachments herein were originally agreed to, once the government modified the terms of the agreement the relationship between the parties became identical to *Loretto*. Since the lawsuit seeks a determination of the parties'

rights after their relationship was altered by the government's intervention, *Loretto* should control.

If, however, the Court holds *Loretto* inapplicable, because the cable attachments herein were originally agreed to, this only means the mandatory provision of pole space is not a "taking" per se. The Court must then consider whether the drastic reduction in the rates that may be charged for pole space is nonetheless a "taking" due to its interference with reasonable investment-backed expectations.

ARGUMENT

I

THE RULE THAT PHYSICAL OCCUPATION IS A "TAKING" PER SE SHOULD APPLY EVEN THOUGH THE OCCUPATION WAS ORIGINALLY INVITED

Appellants (cable operators) would distinguish this case from *Loretto v. Teleprompter Manhattan CATV Corporation* on the ground that appellees (utility companies) willingly allowed access to their poles, whereas the New York law under review in *Loretto* mandated access. *See* brief of appellant cable operators at 28; brief of Federal Communications Commission (FCC) at 14-15. The argument is based upon the principle that a person's rights are not violated if he voluntarily waives them. *See, e.g., Wyrick v. Fields*, 459 U.S. 42 (1982) (waiver of right to counsel); *Oregon v. Elstad*, — U.S. —, 105 S. Ct. 1285 (1985) (waiver of right against self-incrimination).

In the civil no less than in the criminal area the focus is upon voluntariness, and courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 307 (1937). Indeed, courts must "indulge every reasonable presumption *against* waiver." *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (emphasis added); *Aetna Insurance Company v. Kennedy*, 301 U.S. 389, 393 (1937). The Court should not assume that an agreement to carry cables at the prevailing market rate remains voluntary after the government drastically alters the terms of the contract. The very fact that the utility companies have sued shows that they are unwilling to continue the arrangement under the government's terms. Where continued physical occupation of private property is forced upon an unwilling owner by the government, the owner's hardship is just the same as if the occupation were being forced upon the owner for the first time. In fact, the occupation *is* being *forced* upon the owner for the first time.

Loretto is sound law and should not be diluted by an exception for physical invasions which were originally invited. The utility companies' "taking" claim is against the government, not the cable operators. The relevant inquiry, therefore, is not: what happened between the utility companies and the cable operators. Rather, the relevant inquiry is: what happened between the utility companies and the government. It is the situation resulting after the government's intervention that is pertinent, and that situation is identical to *Loretto*. Therefore, the *Loretto* rule should apply.

II

IF AN INVITED OCCUPATION IS NOT A "TAKING" PER SE, THE COURT MUST DETERMINE WHETHER CONTINUED OCCUPATION IS NONETHELESS A "TAKING" UPON THE FACTS OF THE CASE

When the interference with property can be characterized as a physical invasion, such that it constitutes a "taking" per se, this simply avoids the need for the " 'ad hoc factual' inquiry" customarily undertaken to determine whether a "taking" has occurred. *See Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1005 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). If occupation of the utility poles in the case at bar is not considered a physical invasion, because the occupation was originally invited, this Court must still consider whether the government has nonetheless effected a "taking" by substantially interfering with reasonable investment-backed expectations. *Monsanto*, 467 U.S. at 1005.

While it may be true that some of the contracts between cable operators and utility companies were entered into after the enactment of the Pole Attachments Act, 47 U.S.C. § 224, in 1978, at least two of those contracts were executed prior to the Act.[1] Since pole attachment rates were then unregulated, and the utility companies were under no obligation to provide space on their poles for cable operators, the utility companies were justified

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[1] The contract between Florida Power Corporation and Cox Cablevision Corporation was executed in 1963. The contract between Florida Power Corporation and Teleprompter Southeast, Inc., was executed in July, 1977. *See Florida Power Corporation v. Federal Communications Commission*, 772 F.2d 1537, 1539, 1541 (11th Cir. 1985).

in relying upon the terms of their contracts in exchange for allowing the cable operators access. Thus, the contracts formed the basis of a reasonable investment-backed expectation. The expectation was "reasonable" because the terms of the contracts were enforceable. If breached, the utility companies could have recovered damages at law, and a writ of ejectment in equity. The expectation was also "investment-backed." Pole space is limited and the briefs of the parties reveal occasions when utility companies leased space to cable operators which they later needed for their own wires, and consequently had to construct additional carrying facilities. *See, e.g.,* Motion to Affirm, filed by intervenor utility companies, at 11-13.

A case on point is this Court's decision in *Ruckelshaus v. Monsanto Company,* 467 U.S. 986. In that case the Court found no reasonable expectation that the Environmental Protection Agency would keep Monsanto's product formulas confidential when the Federal Insecticide, Fungicide, and Rodenticide Act authorized their disclosure. However, the Court did find a reasonable expectation at an earlier point in time when the Act did not authorize disclosure. The disclosure of formulas submitted during that period of time was held a "taking" of Monsanto's trade secrets.

Similarly, in the case at bar, the utility companies had reasonable investment-backed expectations, at least as to those contracts entered into prior to the Pole Attachments Act, when the law guaranteed enforcement of such contracts. The FCC's frustration of those expectations constitutes a "taking."

The cable operators argue that the utility companies' expectation of getting what they contracted for was not

"reasonable" because the utility companies know theirs is a regulated industry. *See* brief of appellant cable operators at 29. But whether a utility company is subject to rate regulation is determined by reference to the service it is selling, not simply the identity of the company as a "public utility."

> "The character of the *service,* that is, whether *it* is public or private, and not the character of the ownership, determines ordinarily the scope of the power of regulation . . . . " *Van Dyke v. Geary,* 244 U.S. 39, 44 (1917) (emphasis added).

The service here, space on poles which are the utility's private property, is not a service marketed to, or needed by, the general public. Thus, the fact that utility companies are regulated in the rate they may charge consumers for electricity does not mean that utility companies are unjustified in relying upon private contracts for the lease of pole space. Pesticide manufacturing is another regulated business, and so is rental housing in New York. Yet this Court did not hold in *Ruckelshaus v. Monsanto Company* that Monsanto should have anticipated governmental disclosure of its trade secrets just because it belongs to a regulated industry. And in *Loretto v. Teleprompter,* this Court did not rule that Mrs. Loretto must have purchased her building anticipating that she could be required to provide access to cable operators at only $1 per attachment just because New York rental housing is a regulated industry. Accordingly, this Court should not rule that the utility companies herein should have anticipated regulation of pole attachment rates. Rather, this Court should hold that the utility companies had a reasonable investment-backed expectation which could not be taken without compensation.

CONCLUSION

The rule that a government-authorized physical invasion is a "taking" per se should not be qualified by an exception for invasions that were originally invited. Such an exception would be based on a presumption of voluntariness which defies the facts and belies the Court's duty to indulge every reasonable presumption *against* the waiver of fundamental rights. Moreover, it is irrelevant that the invasion was invited prior to governmental intervention, since the "taking" claim complains solely about the situation after governmental intervention.

If the Court were to decide, however, that this was not a physical invasion, it would still need to consider whether it was a "taking" just the same for having substantially interfered with reasonable investment-backed expectations. Enforceable contracts made in the absence of regulation give rise to reasonable investment-backed expectations, which expectations are property rights that cannot be taken without just compensation.

For the preceding reasons the decision of the Eleventh Circuit Court of Appeals should be affirmed.

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Respectfully submitted,

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Nos. 85-1658
85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR EDISON ELECTRIC INSTITUTE *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether the Eleventh Circuit correctly ruled that the Pole Attachment Act, which authorizes the permanent physical attachment of cable television equipment to the property of an investor-owned (private) utility company, constitutes a taking of the utility company's property, for which the fifth amendment requires the payment of just compensation?

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INTRODUCTION

The Edison Electric Institute (EEI) supports Appellees Florida Power Corporation, Tampa Electric Company, Mississippi Power & Light Company, Alabama Power Company, and Arizona Public Service Company in seeking affirmance of the decision of the Eleventh Circuit that the Pole Attachment Act (Communications Act Amendments of 1978), Pub. L. No. 95-234, § 6, 92 Stat. 33 (codified as amended at 47 U.S.C. § 224 (1982 & Supp. III 1985)), is unconstitutional.[1]

INTEREST OF EDISON ELECTRIC INSTITUTE

EEI is the national association of investor-owned electric utility companies in the United States. Its 176 members serve approximately 96 percent of all customers served by the investor-owned segment of the industry. They generate about 75 percent of all electricity in the country, and service 73 percent of all ultimate electric utility customers in the nation.

The Pole Attachment Act applies only to investor-owned utilities. 47 U.S.C. § 224(a)(1).[2] Many EEI member companies are subject to the jurisdiction of

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[1] The written consents of all parties to the filing of this brief have been filed with the Clerk of this Court, pursuant to Sup. Ct. R. 36.

[2] Investor-owned electric utility companies, as distinct from municipal (public) electric utility companies and rural electric cooperatives, and like private businesses, issue stock to shareholders. Of course, investor-owned utility companies are subject to regulation in the provision of electric utility service to the public, including limits on the rate of return to investors. Investor-owned utility companies own property in the name of the utility company, and enjoy property rights like any other corporation.

the Federal Communications Commission (FCC) under the Act. The Act confers authority on the FCC to regulate the rates, terms and conditions of cable television attachments to the utility poles owned by those investor-owned utility companies that are not regulated in this regard by the states. EEI members own and control millions of poles necessary for the transmission and distribution of electric energy to their customers or ratepayers. Private cable television operators have found it to be economically expedient to use a substantial number of these poles for the purpose of attaching cables, amplifiers, power supplies, grounds, guys, anchors and other equipment used in the provision of cable television service.

Under the aegis of the Pole Attachment Act, the FCC repeatedly has authorized cable television companies to occupy space on utility poles owned by EEI members, and paid for by investors and ratepayers, at rates drastically lower than contracted for by the cable operators and the utilities. For example, in this case, rates per pole negotiated by Appellee Florida Power Corporation of $7.15, $5.50, and $6.24 each were reduced by the FCC to $1.79 per pole—reductions of 75 percent, 71 percent, and 62 percent, respectively. *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1541 (11th Cir. 1985) (J.S. App. 1a, 7a).[3]

EEI member companies have a substantial interest in supporting the Eleventh Circuit's rejection of this unconstitutional regulatory scheme, as representatives of both the right of utility company investors to be

[3] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Federal Communications Commission and the United States of America in No. 85-1658.

free from the uncompensated taking of their property and the right of utility ratepayers to avoid a forced subsidy of cable television investors and customers.

COUNTERSTATEMENT OF THE CASE

There are approximately 215 investor-owned electric utilities in the country providing electric utility service to over 77 million customers.[4] The rates electric utility customers pay for this service and the rate of return to the utility's shareholders are regulated by government authorities. To the extent investor-owned utilities are prohibited by federal law from receiving full compensation for the use of their property by virtue of the Pole Attachment Act, the utility company investors and utility ratepayers are forced to subsidize the cost of cable transmission.

Utility poles are owned, operated, maintained and used by investor-owned utilities for providing electricity. Cable companies have entered into contracts with investor-owned utilities allowing the cable companies to use these valuable utility poles. The contractually agreed-upon cable pole attachment rates have been reduced, however, based on rate prescriptions by the FCC using a formula set out by federal statute. 47 U.S.C. § 224(d).[5]

[4] The number of utility customers is based on the number of meters, or accounts, and includes commercial as well as residential customers. Some multistory dwellings may not be separately metered, however. Therefore, this number does not necessarily reflect the number of separate residential households receiving electric utility service.

[5] Drastic reductions by the FCC in contractually established pole attachment rates have been commonplace. The FCC his-

The customers served by investor-owned utilities pay for and receive electricity, a necessity of modern life. In contrast, subscription to cable television entertainment service is a matter of choice. Many electric utility ratepayers do not elect to subscribe to cable, *e.g.*, commercial establishments, residential utility ratepayers who own satellite dishes, or people who object to certain cable programming selections. Only about 41 percent of all television households[6] currently subscribe to cable,[7] and only about 55 to 57 percent of homes with access to cable elect to subscribe.[8] Electric utility ratepayers, as a result, subsidize the cost of cable service for those choosing to subscribe insofar as pole attachment rates are kept artificially low.

torically has sharply reduced rates previously agreed to by cable operators under the Pole Attachment Act. *See, e.g., Television Cable Serv., Inc. v. Monongahela Power Co.*, 88 F.C.C.2d 56 (1981) (per pole contract rates of $7.17 and $8.16 reduced to $1.46); *Teleservice Corp. of America v. Southwestern Pub. Serv. Co.*, No. PA-79-0010 (FCC July 17, 1981) (per pole contract rates of $5.00 and $4.00 reduced to $.90). Moreover, in this case, the FCC reduced the Group W and Acton CATV contract rates below what the cable companies requested.

[6] Television households are simply the number of U.S. households equipped with at least one television set. There were approximately 86.4 million TV households, compared to 34 to 40 million cable households, as of the end of 1985. National Association of Broadcasters, *Great Expectations: A Television Manager's Guide to the Future* 11, 19 (Apr. 1986) [hereinafter cited as NAB Report].

[7] Leepson, *Cable Television: Coming of Age*, Vol. II, No. 24 Congressional Quarterly Editorial Research Reports 967 (Dec. 27, 1985) (citing *Television Digest* (May 1985)).

[8] NAB Report, *supra* note 6, at 20.

Cable operators normally must obtain a franchise agreement with a municipal authority which permits them to offer cable television service in the franchise area. Most franchising authorities select one cable operator to provide cable service in a given area, and the selected cable operator usually enjoys a monopoly position relative to the provision of cable television service in that area. *See Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 899–900 (W.D. Mo. 1985). Cable operators pay a fee to the franchising authority for the cable franchise, and pass on the costs of providing cable service to cable subscribers.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly ruled that the Pole Attachment Act, 47 U.S.C. § 224, which authorizes the permanent physical attachment of cable television equipment to the property of investor-owned utility companies, constitutes a taking of that property in violation of the fifth amendment.

Investor-owned utilities are entitled to full recognition of their constitutional property rights. These rights are in no way diminished by the use of the property to provide electricity or by the accompanying government regulation of such use. Under the fifth amendment, the private property of an investor-owned utility may not be taken for use by cable television companies or any other entity without the payment of just compensation.

This case is controlled by the traditional *per se* taking rule applicable to permanent physical occupation of property applied by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419

(1982). The Pole Attachment Act, like the statute struck down by the Court in *Loretto*, allows cable television companies to attach cable equipment to private property without providing just compensation as required by the fifth amendment. Neither the character of the permanent physical taking nor the private property rights at issue distinguish this case from *Loretto*.

Appellants and their *Amici* essentially are asking the over 77 million electric utility ratepayers to subsidize the cable television industry and those who have chosen to receive their service. The Eleventh Circuit's rejection of this untenable proposition is in complete accordance with this Court's decision in *Loretto* and should be affirmed.

ARGUMENT

I. Investor-Owned Utilities Are Entitled to Full Recognition of Their Constitutional Property Rights Under the Fifth Amendment.

The property of investor-owned utilities used to provide electricity is private property within the protection of the fifth amendment to the United States Constitution. The fifth amendment requires the payment of just compensation when private property is taken for a public use. U.S. Const. amend. V. Accordingly, a governmentally authorized taking of the property of an investor-owned utility is constitutional only on the payment of just compensation.[9]

[9] EEI is not specifically addressing the issue of whether the Pole Attachment Act fails to provide for the determination of just compensation required by the fifth amendment. EEI adopts the position taken on this issue by the Appellees.

The arguments of both the Federal and Cable Appellants essentially suggest that investor-owned utilities do not have private property rights in their utility poles. There simply is no support for this position.[10]

The Appellants rest their case for a utility exception to the fifth amendment on the facts that the utility poles are used to provide a public utility service and that investor-owned utility companies are regulated by government authorities in their provision of utility service.[11] Group W Brief at 16, 18–20; Federal

[10] Notwithstanding their arguments for a utility exception to the taking clause, the Cable Appellants acknowledge that some "utility property can, of course, be the subject of an unconstitutional taking." *See* Group W Cable, *et al.* [hereinafter cited as Group W] Brief at 22 n.51. The Cable Appellants fail to distinguish between the utility property they admit is protected by the fifth amendment and utility poles, except on the basis that cable companies have a present economic interest in using the poles. *Id.* The interest of the party for whose benefit private property is taken does not remove the constitutional requirement of just compensation to the property owner.

[11] The Federal Appellants argue that the utility companies "simply object to the regulation of rates they charge for permitting an additional set of wires to be strung on poles they themselves use for *precisely that purpose, and only for that purpose.*" Federal Appellants' Brief at 14 (emphasis added). In fact, the utility companies use their poles for a wholly distinct purpose (provision of electricity) from the purpose for which the cable companies seek access (provision of television entertainment). The distinction is not insignificant. Even assuming that utility company property is dedicated to a public use, such dedication is to the company's basic utility service. The Pole Attachment Act allows for uncompensated physical access for provision of enhanced television service, a function totally unrelated to providing electricity.

Appellants' Brief at 13–14. This Court previously has held with respect to the constitutional protection afforded to private property devoted to a public rather than a private use that "[t]here is no difference whatever in principle arising from the difference in the uses." *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U.S. 540, 570 (1904). Western Union had argued that the railroad could not require it to remove its poles and wires from the railroad right-of-way because the right-of-way was "property devoted to a public use." *Id.* at 573. The Court agreed that the railroad property was devoted to a public use, but held that, nonetheless, the right-of-way was protected from a taking without just compensation under the fifth amendment.[12]

The Court consistently has held that neither government authorities as regulators of utility services nor the public as consumers of such services are entitled to any interest in the property of investor-owned utility companies that is used to render such services.[13] Surely, cable operators cannot be entitled to the right to physically occupy utility company prop-

[12] *Accord ICC v. Oregon-Washington R.R. & Nav. Co.*, 288 U.S. 14, 40–41 (1933) (despite the fact that railroads are dedicated to public use, they are the private property of their owners and their assets cannot be taken without just compensation).

[13] *See Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 262 U.S. 276, 289 (1923) ("It must never be forgotten that while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general powers of management incident to ownership.") and *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 32 (1926) ("By paying bills for service [ratepayers] do not

erty free from constitutional limitations when neither government authorities nor ratepayers could assert such a right. Moreover, were the Court now to hold that utility property belongs to the government, to the ratepayers, or to any other members of the public at large (such as the cable operators), the untenable result would be that *any* industry which provides public services and is regulated for public policy reasons—including the cable industry—no longer would have protected rights in its property.

Extending the Appellants' argument to its logical conclusion, the government could order utility companies to make the following utility company property available to the public: extra office space; conference rooms during times when they are not otherwise in use; computers, photocopiers or other equipment when not otherwise in use, etc. Such intrusive uses of utility-owned property cannot be justified based on the fact that the property is used in the provision of electricity to the public and is subject to government regulation in connection with that use. As the Cable Appellants recognize, Group W Brief at 22 n.51, there is no precedent for the proposition that an investor-owned company denudes itself of fifth amendment protection by using its property for a utility service. Yet this is the logical terminus of the Appellants' argument.

A determination that investor-owned utility companies have no fifth amendment rights against the uncompensated taking of their property by cable companies would be inconsistent with the decisions of this

acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.").

Court recognizing the constitutional rights of utilities in other contexts. As Justice Marshall stated in his concurring opinion in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 106 S. Ct. 903, 915 n.1 (1986):

> That the utility passes on its overhead costs to ratepayers at a rate fixed by law rather than the market cannot affect the utility's ownership of its property, nor its right to use that property for expressive purposes, see *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 534 n. 1, 100 S.Ct. 2326, 2331 n. 1, 65 L.Ed.2d 319 (1980).

Expanding on the precedent of *Consolidated Edison*, the Court found in *Pacific Gas & Electric* that the regulated status of a utility company does not lessen its right to be free from state regulation that burdens its speech. 106 S. Ct. at 912 n.4 (1986). Implicit in both the plurality and the concurring opinions in *Pacific Gas & Electric* is the principle that utility companies have private property rights in their billing envelopes. 106 S. Ct. at 910 n.8, 912, 913, 914 (Burger, C.J., concurring); 915 n.1, 917 (Marshall, J., concurring). *A fortiori*, investor-owned utility companies have private property rights in their utility poles as well.[14]

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[14] *Amici* Nor-West Cable Communications and Preferred Communications, Inc. argue, Brief at 11-16, that the Eleventh Circuit's decision will result in restraining the first amendment rights of the cable companies. To the extent that first amendment rights of the cable companies might even come into play in this case, however, they do not justify taking electric utility property without just compensation.

II. The Permanent Physical Attachment of Cable Television Equipment to Investor-Owned Utility Poles Constitutes a *Per Se* Taking.

A. This Case Is Controlled By the Traditional *Per Se* Taking Rule Reaffirmed in *Loretto*.

The Eleventh Circuit's decision falls squarely within the parameters of the traditional *per se* rule of the fifth amendment, reaffirmed by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.* that "a permanent physical occupation *is* unquestionably a taking." 458 U.S. 419, 435 n.12 (1982) (emphasis in original).[15] Inasmuch as the fifth amendment applies with full force to the private property of an investor-owned utility, as discussed above, there is no need for the Court to look beyond *Loretto* in deciding whether the Pole Attachment Act effects a compensable taking.[16]

In analyzing property rights under the fifth amendment, this Court has adopted a "bundle of rights" approach, which includes, *inter alia*, the rights to possess, use and dispose of property, and the right

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[15] As the Court stated in *Loretto*, "the character of the [physical] invasion is qualitatively more intrusive than perhaps any other category of property regulation." 458 U.S. at 441. The Court's decision in *Loretto* did not break any new ground, but merely recited the traditional rule that in cases involving a permanent physical occupation, a taking always has been found. *See id.* at 427-28, 435, 441.

[16] The facts in *Loretto* are indistinguishable from the facts in this case. In *Loretto*, the Court held that a New York law requiring property owners to permit attachment of cable television equipment to their property constituted a compensable taking.

to exclude others from using the property.[17] As the Court recognized in *Loretto*, "[t]o the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights." 458 U.S. at 435 (emphasis in original). The Court noted:

> The one incontestable case for compensation . . . seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.

Id. at 427 n.5, (quoting Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) (footnote omitted)); *see also United States v. Causby*, 328 U.S. 256, 266–67 (1946); *United States v. Petty Motor Co.*, 327 U.S. 372, 374–75, 384–85 (1946); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 657–59 (1981) (Brennan, J., dissenting).

In *Loretto*, the Court reaffirmed "the rule that a permanent physical occupation is a government action of such unique character that it is a taking without regard to other factors that a court might ordinarily examine." 458 U.S. at 432. The Court held:

> [W]hen the physical intrusion reaches the extreme form of a permanent physical occupation, . . . "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is *determinative*.

[17] *See, e.g.*, *Loretto*, 458 U.S. at 433, 435; *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); and *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

Id. at 426 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)) (emphasis added).

A permanent physical occupation of private property, authorized by government action, universally is considered to be a compensable taking under the fifth amendment without regard to the public benefit of the occupation or the extent of the economic impact on the property owner. *Id.* at 435–36. Those factors are considered only in the more difficult cases involving an alleged taking through some nonpossessory (*i.e.*, nonphysical or temporary) regulation or use, to which the protection of the fifth amendment has been extended.[18] In this case, as in *Loretto*, a physical invasion of property is at issue.[19] Thus, it was not only proper, but indeed required under principles of *stare decisis*, for the Eleventh Circuit to follow *Loretto* in

[18] The multifactor balancing test referred to in the cases cited by Appellants, Group W Brief at 23 n.53, only applies to takings which do not involve a permanent physical invasion of private property. *See, e.g.*, *Connolly v. Pension Benefit Guar. Corp.*, 106 S. Ct. 1018 (1986) (unsuccessful fifth amendment challenge to provisions of statute governing multi-employer pension plans which nullified a contractual provision limiting liability); *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986) (compensable taking not established in case involving rejection by a planning commission of a proposal to subdivide real property into lots); and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (no violation of fifth amendment property rights when public was given temporary access to shopping center to exercise protected first amendment right of free speech).

[19] As in *Kaiser Aetna v. United States*, 444 U.S. at 179–80, this is not a case in which the government merely is exercising regulatory power, but rather involves physical invasion of property by the government.

reaching the conclusion that the Pole Attachment Act allows an unconstitutional taking.

B. The Permanent Physical Taking Allowed Under the Pole Attachment Act Is Indistinguishable from *Loretto*.

As the Eleventh Circuit properly recognized, "*Loretto* and the instant case are virtually indistinguishable; they both involve the placement of plates, boxes, wires, bolts and screws upon the property of a reluctant owner." J.S. App. at 14a. At least one other court simply assumed that the physical attachment of such cable equipment to utility property "is clearly a taking" under the authority of *Loretto. Alabama Power Co. v. FCC,* 773 F.2d 362, 367 n.8 (D.C. Cir. 1985) (vacating the FCC's decision that pole attachment rates of electric utility companies were excessive; and noting, without reaching the issue, that the physical attachment of cable equipment to the utility poles would be a taking under *Loretto*).

Appellants attempt to avoid the result mandated under *Loretto* by asserting that, although the utility company's poles are physically occupied by the cable television equipment, the space occupied by cable may be reclaimed by Florida Power under the terms of the pole attachment contracts if the space is required for utility service. Group W Brief at 24-28; Federal Appellants' Brief at 15-18. This argument assumes that the utility company will be allowed to enforce its contractual arrangements.[20] In fact, as the Eleventh Circuit stated, "the FCC has made it quite clear

[20] Notwithstanding their assertions in this case, the cable companies argued in *City of Los Angeles v. Preferred Communications, Inc.*, slip op. No. 85-390 (June 2, 1986), that access to utilities' poles may not be limited, at least by the government.

that it intends to require continued provision of space at FCC—ordered rates." J.S. App. at 12a. Unlike the property owner in *Loretto,* who could have forced the cable company to disconnect at any time by occupying the building herself or by converting it to a commercial property, it is a virtual certainty that the utility company will not be permitted by the FCC to disconnect cable attachments on the basis of any contractual provisions. *See id.* (citing *Loretto*, 458 U.S. at 439 & n.17).[21] Thus, as the Eleventh Circuit held, "the extent of the occupation in the case of Florida Power not only satisfies *Loretto's* permanency requirement, but significantly exceeds it." J.S. App. at 13a.

The fact that, as an initial matter, investor-owned utility companies voluntarily entered into contracts with cable companies does not in any way detract from the conclusion that there has been a permanent physical taking of property for which just compensation is due. Access voluntarily granted at a nego-

[21] The FCC has ruled uniformly that utilities may not refuse to permit cable operators to continue to occupy space on poles owned and operated by the utilities for provision of electricity. *See, e.g., Whitney Cablevision v. Southern Indiana Gas & Elec. Co.*, FCC Mimeo No. 841 (Nov. 16, 1984); *Tele-Communications, Inc. v. South Carolina Elec. & Gas Co.*, FCC Mimeo No. 3994 (Apr. 19, 1985). In one case, *David Bailey d/b/a Port Gibson Cable TV v. Mississippi Power & Light Co.*, FCC Mimeo No. 36118 (Sept. 11, 1985), the FCC ruled that a utility must expand its facilities to make room for initial attachments by a new cable operator. The mere recitation of the facts in the *Port Gibson* case by the Federal Appellants in no way supports their bare assertion that the FCC has not attempted to limit the utilities' power to terminate pole attachment contracts. Federal Appellants' Brief at 16-17.

tiated rate no longer can be considered voluntary at the substantially reduced rate imposed under the Pole Attachment Act.[22] As the Eleventh Circuit recognized:

> [B]y insisting on a significantly lower rate, the cable companies have themselves transformed their status from that of an invitee, to use their own terms, to that of an unwanted guest. While they may have been invited at the outset, they certainly weren't invited at the rate imposed by the FCC.

J.S. App. at 10a–11a. Moreover, in *Loretto* the cable company also had routinely entered into agreements with property owners for the initial attachment of cable equipment to the property. 458 U.S. at 423.[23] Thus, the alleged distinction between the two cases is simply a red herring.

C. The Private Property Rights at Issue in this Case Are Indistinguishable from the Private Property Rights Upheld in *Loretto*.

Utility rate regulation, like the rent control applicable to the apartment building in *Loretto*, does not in any way abrogate the applicable fifth amendment rights of investor-owned utilities. The issue before the Court is not, as the Appellants would have the Court believe, whether government authorities will be able to continue regulating utility rates and services if

[22] By allowing the cable companies to attach their cables at a rate substantially below the agreed-upon contract rate, the statute provides a windfall for the cable companies.

[23] Under those agreements, property owners had been compensated at a standard rate of five percent of gross revenues realized by the cable company from the particular property. 458 U.S. at 422–23.

investor-owned utilities are found to have fifth amendment rights, just as the issue in *Loretto* was *not* whether states would be able to continue regulating housing conditions or landlord/tenant relationships. *See* 458 U.S. at 440.

In *Loretto*, this Court distinguished cases involving state regulation of housing conditions or landlord/tenant relationships based on the fact that such regulations do not authorize the permanent occupation of the landlord's property by a third party. *Loretto*, 458 U.S. at 440 (distinguishing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) (*overruled* subsequent to the *Loretto* decision in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983)); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); and *Block v. Hirsh*, 256 U.S. 135 (1921)). The Court here also can distinguish the utility rate cases cited by Appellants and their *Amici* on similar grounds: utility rate regulation does not authorize the permanent occupation of utility property by a third party.[24]

[24] EEI disagrees with the Federal Appellants' unsupported and confusing claim that regulation of the rates charged to the cable companies by investor-owned utilities "would be no less consistent with the Just Compensation Clause than is any other component of the state rate regulation scheme." Federal Appellants' Brief at 11. The fact that investor-owned utilities are subject to rate regulation *for selling electricity* is not relevant to the question of whether there is a compensable taking when the government authorizes the permanent occupation of the utility's property by a third party. Accordingly, cases cited by

Without any basis for distinguishing *Loretto*, Cable Appellants and their *Amici* attempt to ride the backs of the ratepayers, arguing that, regardless of whether the cable companies justly compensate investor-owned utilities for their occupation of the utility poles, the utilities will be made whole by the ratepayers. *See* Group W Brief at 23, and *Amicus* Texas Cable TV Association, Inc., *et al.*, Brief at 11. This argument misconceives the issue before the Court. The issue is not whether regulation provides utilities an opportunity to earn a fair return on investment from the ratepayers, but whether a physical taking of private utility property by the cable industry requires just compensation.[25] This is the precise question which was before the Court in *Loretto* and which was answered in the affirmative.

Appellants (Group W Brief at 22 n.51, Federal Appellants' Brief at 9–10) to support the proposition that fifth amendment taking claims by utilities have been rejected when the utility rates assure a nonconfiscatory return have no applicability to this case.

[25] In *Texas Power & Light Co. v. FCC*, 784 F.2d 1265, 1272 (5th Cir. 1986), the Fifth Circuit rejected Group W's argument that the utility company would, in any case, receive a fair return from utility ratepayers, as if that somehow justified passing on costs to the ratepayers so that cable television companies can benefit.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Edison Electric Institute respectfully urges the Court to affirm the decision of the Eleventh Circuit.

Respectfully submitted,

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Nos. 85-1658 and 85-1660

In the Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Appellants
v.
FLORIDA POWER CORPORATION, *et al.*
Appellees

GROUP W CABLE, INC., *et al.*,
Appellants
v.
FLORIDA POWER CORPORATION, *et al.*
Appellees

On Appeals from the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICI CURIAE OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY AND PACIFIC NORTHWEST BELL TELEPHONE COMPANY IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE

Amici curiae, The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company ("MTN, NWB and PNB") are telephone companies divested from the American Telephone and Telegraph Company pursuant to the consent decree entered in *United States v. American Telephone and Telegraph Co.*[1] Collectively,

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[1] 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Their stock is owned by U S West, Inc., a publicly-traded holding company.

MTN, NWB and PNB provide telephone exchange and related services in an area which covers approximately 40 percent of the continental United States.

MTN, NWB and PNB own and use, both solely and in conjunction with local power companies and municipalities, poles and underground conduits for the placement of telephone and power lines. Because MTN, NWB and PNB are certificated common carriers under the laws of the states in which they do business, they are authorized to place their poles and conduits (and associated wires) on streets and public rights-of-way obtained from the appropriate local municipalities.[2] Poles are also located on easements of MTN, NWB and PNB (and wires are buried—that is, without a "conduit"—along similar easements), as well as on property owned in fee by the companies. When MTN, NWB and PNB share space on a pole owned by another utility, they pay a rate for such space which generally approximates its "market" value.

A telephone company generally receives the authority to construct its privately owned poles and conduits within the public right-of-way in exchange for its duty, as a common carrier, to provide telecommunications service to the public on a non-discriminatory basis. These common carrier services are often subject to rate regulation by the Federal Communications Commission ("FCC") or, where appropriate, state regulatory agencies. However, this common carrier duty to serve entails the transmission of information on behalf of customers; there is no common carrier service obligation to provide access to telephone poles and conduits themselves—as these facilities remain private property.

Cable television ("CATV") companies, because they also utilize wire for distribution of services, can obtain

[2] Throughout this brief, MTN, NWB and PNB utilize the term "pole" to refer to both poles and conduits.

a significant economic benefit if they use pre-existing poles and conduits, rather than constructing their own. CATV companies currently make use of the poles owned by MTN, NWB and PNB on a "space available" basis, subject to state regulation or, where the state does not provide the "certification" demanded by the statute at issue herein (the "Pole Attachment Act"), subject to the FCC's rules under the Act.[3] The rates which CATV companies pay MTN, NWB and PNB for use of telephone company poles and conduits (under the Pole Attachment Act or applicable state rules—where appropriate) are typically lower than the rates which MTN, NWB and PNB pay or receive for similar pole space in other contexts.

Unlike MTN, NWB and PNB, CATV companies do not offer common carrier services to the public. To the contrary, they generally control the information content of their transmissions and in such event are not regu-

[3] Communications Act Amendments of 1978 ("Pole Attachment Act"), 47 U.S.C. § 224 (1978). The Pole Attachment Act was amended in 1983. The amended version of the Act is not at issue in this proceeding. Because the interstate common carrier telecommunications services offered by MTN, NWB and PNB are subject to regulation by the FCC under Title II of the Communications Act, 47 U.S.C. § 201, *et seq.*, the FCC's jurisdiction over MTN, NWB and PNB does not depend upon the Pole Attachment Act (unlike Florida Power which, as an electric utility, is not otherwise subject to FCC jurisdiction). In fact, although never reviewed by this Court, the FCC's authority to regulate certain aspects of the pole attachment practices of telephone companies where there was a legally supportable finding of a potential for "abuse of monopoly power" has been affirmed by the Court of Appeals for the Fifth Circuit on one occasion. *See General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971), in which the Fifth Circuit sustained the FCC's conditioning of CATV related interstate carrier authorizations upon grants by telephone companies of certain pole attachment rights to competing CATV companies.

lated as common carriers.[4] In this regard, CATV service is offered pursuant to a local franchise,[5] and is subject to state and federal regulation.[6] Generally speaking, only one CATV company provides service in any one location.[7]

In this case Florida Power had entered into several contracts with three CATV companies for pole space, and the CATV companies subsequently complained to the FCC that the rates they had agreed to pay were too high. The FCC, finding jurisdiction under the Pole Attachment Act, agreed and ordered that the contract rates should be reduced by approximately seventy percent. The United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"), based in part upon a finding that Florida Power, under FCC practice, could not realistically effectuate a removal of the CATV wires from its privately owned poles, held that a "taking" of Florida Power's property had occurred.[8] Predicated upon this finding of

[4] *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). Some CATV companies do provide services which are the equivalent of common carrier telephone services. *See Cox Cable Communications, Inc.*, 102 F.C.C.2d 110, 121 (1985).

[5] The franchise process itself is under attack by various CATV companies. *See City of Los Angeles v. Preferred Communications, Inc.*, —— U.S. ——, 106 S. Ct. 2034 (1986).

[6] *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). The authority which state and federal regulators exercise over CATV companies is, however, limited. *See FCC v. Midwest Video Corp., supra* (federal common carrier rules); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 2889 (1986) ("must carry" rules); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) ("indecent" CATV programming); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (same).

[7] *See City of Los Angeles v. Preferred Communications, Inc., supra.*

[8] *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1539 (11th Cir. 1985) ("*Florida Power Corp.*"). This decision tracked the decision of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) ("*Loretto*").

a "taking", the Eleventh Circuit also found that the procedure utilized by the FCC to set "just compensation" for this taking did not pass constitutional muster under the Fifth Amendment to the Constitution.[9]

Two separate groups of appellants noticed appeals of the Eleventh Circuit decision.[10] Both appellants predicate their appeals on the assertion that the Eleventh Circuit completely negated the Pole Attachment Act on constitutional grounds. Arguing from this premise, appellants further set forth theories of utility regulation which would, if accepted, dramatically reduce the ability of companies which provide utility services to maintain their private property free from governmental taking. As companies which provide common carrier telecommunications services and which own telephone poles and conduit facilities, MTN, NWB and PNB's interests are affected by the outcome of this case. In this brief, *Amici Curiae* make essentially two arguments:

1) The constitutional issues raised by appellants are not properly before this Court given the context of the instant proceeding; and

2) There is no basis for acceptance of appellants' position that the private property of public utilities is not afforded full Fifth Amendment protection against uncompensated governmental takings.

SUMMARY OF ARGUMENT

The primary thrust and focus of appellants' arguments in this case are predicated on the assertion that the Eleventh Circuit invalidated the Pole Attachment Act on constitutional grounds. While the Eleventh Circuit did find that the FCC's specific action with respect to Florida

[9] *See Florida Power Corp.*, 772 F.2d at 1544-46.

[10] Appellants FCC and United States of America are referred to herein as "FCC." Appellants Group W Cable, Inc., Cox Cablevision Corporation and National Cable Television Association, Inc. are referred to as "Group W."

Power's private property constituted a constitutional "taking" of that property, the Eleventh Circuit decision was directed at the FCC's conduct, not the Act itself. In fact, all parties are in agreement that the Pole Attachment Act does not authorize the FCC to "take" space on Florida Power's privately owned poles. Thus, review of the Eleventh Circuit's finding that the FCC unlawfully "took" Florida Power's private property should not involve the constitutionality of the Pole Attachment Act. Because the jurisdiction allotted to the FCC under the Act is extremely narrow, the substantial FCC interference with Florida Power's private property found by the Eleventh Circuit was in excess of the FCC's lawful authority. Therefore, the Eleventh Circuit's decision can be affirmed without reaching the constitutional issues raised by the FCC and Group W.

On the merits, both appellants rely upon the erroneous assertion that the private property of companies which provide utility service is entitled to only diminished protection against governmental takings. This argument fails to recognize the fundamental difference between the services which utilities provide—which may be properly subject to rate regulation by the proper governmental authority—and the private property of such a utility—which enjoys full Fifth Amendment protection to the same extent as that of any other entity. The Eleventh Circuit properly found that the authority of the FCC to regulate utility service did not include, and could not include consistent with the Fifth Amendment, the right to take utility property without application of the full panoply of protections mandated by the Constitution.

ARGUMENT

I. THE BROAD CONSTITUTIONAL ISSUES RAISED BY APPELLANTS ARE BASED UPON THE ERRONEOUS ASSERTION THAT THE ELEVENTH CIRCUIT INVALIDATED THE POLE ATTACHMENT ACT ON CONSTITUTIONAL GROUNDS

Both appellants assert that the Eleventh Circuit invalidated the Pole Attachment Act on constitutional grounds. However, we read the Eleventh Circuit decision much more narrowly—it merely invalidated several specific actions of the FCC on constitutional grounds. The Eleventh Circuit found that the FCC's actions with respect to specific contracts between Florida Power and three CATV companies amounted to a "taking" of Florida Power's private property. Based upon this "taking" conclusion, the Eleventh Circuit further found that the procedure for establishing rates set forth in the Pole Attachment Act did not comport with the constitutional "just compensation" requirements which apply whenever the government "takes" private property.

In their briefs, however, appellants concede that the Pole Attachment Act is a very narrow statute which vests limited authority in the FCC and does not authorize the FCC to "take" space on privately owned utility poles. MTN, NWB and PNB further submit that the Act does not authorize the FCC to interfere with a utility's exercise of domain over its private property in the manner declared unlawful by the Eleventh Circuit. Therefore, the lawfulness or unlawfulness of the FCC's actions with respect to Florida Power's property are not dependent upon whether or not the Pole Attachment Act is constitutional. To the contrary, it is the FCC's actions under the guise of the Pole Attachment Act which are properly before this Court, not the validity of the statute itself. Put simply, the threshold issue before this Court is whether the FCC actions which form the factual predicate for the Eleventh Circuit's taking finding are within the narrow delegation of authority contemplated by the Act.

The Constitutional issues raised by appellants are significant and involve complex questions regarding the interplay between constitutional property protections and government regulations. Because of the manner in which this case has reached the Court, however, these issues need not be decided here. Accordingly, we submit that the Eleventh Circuit's decision can be affirmed without reaching the constitutional questions raised by Appellants.

A. The Eleventh Circuit's Decision That The FCC's Actions Effectuated A Taking Was Not Based Upon An Invalidation Of The Pole Attachment Act

Both appellants assert that the Eleventh Circuit's decision invalidated the Pole Attachment Act *per se*. Thus, the FCC frames the essential question as:

> [w]hether the Pole Attachment Act of 1978 . . . effects a taking under the Fifth Amendment.[11]

Group W goes further, stating the issue as:

> [w]hether pole attachment rate regulation constitute[s] a taking *per se* as government compelled permanent physical occupation . . . .[12]

Group W even implies that acceptance of the Eleventh Circuit's analysis would result in a situation where "utility regulation would raise a constitutional issue at every turn." [13]

The Eleventh Circuit decision, however, was based on the manner in which the FCC had implemented the Act, and it was this specific FCC action, not the Act itself, which resulted in the Eleventh Circuit's finding that the agency had become involved in a taking. Specifically, the Eleventh Circuit concluded that:

> [T]he [FCC] *Order*, which [1] mandates a rental rate of less than one-third the agreed upon rates and

[11] FCC Brief at i.

[12] Group W Brief at i.

[13] *Id.* at 24.

> [2] which in reality precludes Florida Power from excluding the cable companies under any circumstances, amounts to a taking of private property for which just compensation is due under the Takings Clause of the Fifth Amendment.[14]
>
> * * * *
>
> [W]e hold that the *FCC's Order* effected a taking.[15]

The Court added that:

> Once there has been a taking, the determination of just compensation is a judicial, and not an administrative function. Because the Act does not properly allow for a judicial determination of just compensation, it is in our opinion, unconstitutional.[16]

The Eleventh Circuit's taking finding was predicated upon the FCC's invalidation of lawful contracts between Florida Power and three CATV companies upon complaint by the CATV companies that the rates they had agreed to pay were too high.[17] The Court found that the FCC mandated a rate of less than one third of the agreed upon rate.[18] More significantly, the Eleventh Circuit found that the FCC had, as part of its mandated reduction in these contract rates, materially interfered with Florida Power's ability to evict the CATV companies from its privately owned utility poles (and, in fact, had effectively made it impossible for Florida Power to do so).[19] This latter finding was predicated on two more general findings which neither appellant contests: 1) that the FCC had, through a uniform pattern of conduct, repeatedly voided attempts by utility pole owners

[14] *Florida Power Corp.*, 772 F.2d at 1539 (emphasis added).

[15] *Id.* at 1544 (emphasis added).

[16] *Id.* at 1539.

[17] *See id.* at 1539, 1543.

[18] *See id.* at 1541.

[19] *See id.* at 1543.

to evict CATV operators;[20] and 2) that the FCC had adopted a regulation that utility pole owners could not evict CATV operators "in order to avoid . . . Commission jurisdiction."[21] Under these circumstances, the Eleventh Circuit reached the unsurprising conclusion that the FCC's actions amounted to a taking of Florida Power's property.[22] Nowhere did the Eleventh Circuit find that this taking was mandated (or even contemplated) by the Pole Attachment Act.

Both appellants go to great lengths to point out that the Pole Attachment Act is very narrow, and does not purport to grant the FCC plenary authority over privately owned utility poles. The FCC argues that the Pole Attachment Act does *not* grant the FCC "general ratemaking authority;"[23] that it does not vest CATV companies with a "right to attach anything" to utility poles;[24] and that the Act does not vest the FCC with the power to materially interfere with the ability of the utility to require CATV companies to vacate their poles.[25] In fact, the FCC sets forth the proposition that the Pole Attachment Act is nothing more than a dispute resolution mechanism which applies "only when the parties themselves are unable to reach a mutually satisfactory arrangement;"[26] an anomaly, given the fact that the FCC voided an otherwise lawful contract. In short, the FCC's position is that its authority under the Pole Attachment Act is "temporary" and "limited."[27]

We submit that the FCC's and Group W's assertions of the limited nature of the Pole Attachment Act are correct. For example, it is clear that Congress did not intend the Pole Attachment Act to vest the FCC with general regulatory authority over pole attachments;[28] did not grant CATV companies "a guarantee of access . . . to utility poles;"[29] and was meant to be only a temporary "flexible program . . . [t]o assist parties in their private resolution of CATV pole attachment disputes."[30] In fact, the legislative history of the Act reflects that the FCC was not authorized to assert "taking" jurisdiction under the Pole Attachment Act, stating that the "exercise of rights of eminent domain . . . are beyond the scope of FCC CATV pole attachment jurisdiction."[31] What is more,

[20] *See id.* at 1543-44.

[21] *See id.* at 1544. While asserting that no "taking" occurred under the facts here, the FCC in its brief admits that a "utility's power to terminate an agreement is unclear under the Act, and the Commission has not attempted to define the limits of that power." FCC Brief at 16-17.

[22] *See Florida Power Corp.*, 772 F.2d at 1544.

[23] FCC Brief at 12.

[24] FCC Brief at 14; *cf.* Group W Brief at 12, n.34.

[25] FCC Brief at 18-19. Group W concedes that CATV companies receive "at best, a revocable license" under the Pole Attachment Act, Group W Brief, p. 25, and states that "[u]nlike the statutory scheme addressed in *Loretto*, . . . Florida Power continues to control the use of its property, and may repossess and occupy space used by a cable operator any time that space is needed for utility service." Group W Brief at 26.

[26] FCC Brief at 5. This position is consistent with the FCC's claim that the Pole Attachment Act does not apply at all unless the utility has first reached a voluntary agreement with a CATV company. FCC Brief at 5.

[27] FCC Brief at 5.

[28] *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. 15 (1977), *reprinted in* 2 U.S. Code Cong. & Ad. News 109, 123 (1978) ("Senate Report") (The Act "stops short of declaring the provision of pole space to [cable operators] 'wire or radio communications' per se, or that poles constitute 'instrumentalities, facilities, apparatus', et cetera incidental to wire communications (as used in section 3(a) of the Communications Act, 47 U.S.C. 153(a). . . . This expansion of FCC regulatory authority is strictly circumscribed.").

[29] *See* Senate Report at 16. 2 U.S. Code Cong. & Ad. News at 124.

[30] *See* Senate Report at 22. 2 U.S. Code Cong. & Ad. News at 130.

[31] *See* Senate Report at 16. 2 U.S. Code Cong. & Ad. News at 124.

even were the history of this statute less clear, "taking" authority, in order to be valid, must be expressly conferred by statute.[32]

The very narrow jurisdiction conferred by the Pole Attachment Act contrasts with the broad-sweeping governmental interference with Florida Power's private property rights reversed by the Eleventh Circuit. The fact that the conduct described by the Eleventh Circuit exceeded the FCC's statutory mandate merely emphasizes that the Eleventh Circuit's threshold "taking" finding did not implicate the constitutionality of the Pole Attachment Act itself. We submit that, at the very most, the Eleventh Circuit found that the FCC's actions at issue here constituted a "taking" of Florida Power's property—the Eleventh Circuit did not invalidate the Act itself or rule that the Act mandated or even permitted such a taking.

[32] *Hooe v. United States*, 218 U.S. 322, 336, 31 S. Ct. 85, 89 (1910). *See also Washington Metropolitan Area Transit Authority v. One Parcel of Land*, 706 F.2d 1312 (4th Cir.), *cert. denied*, 464 U.S. 893 (1983). As noted by the Ninth Circuit in addressing the difference between regulatory and taking power:

> [The agency] was given only the power to regulate, not the power to condemn. The statutory grant of the power of eminent domain must be indicated by express terms or by clear implication. The delegation of police power [to the agency] was neither an express grant of condemnation power nor one by implication.

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1358 n.7 (9th Cir. 1977) (internal citations omitted), *rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Reg. Plan. Agency*, 440 U.S. 391 (1979). Some lower federal courts have held, that "grant of [eminent domain] power will never pass by implication." *City of Thibodaux v. Louisiana Power & Light Co.*, 153 F. Supp. 515, 517 (E.D. La. 1957) (J. Skelly Wright), *rev'd on other grounds*, 255 F.2d 774 (5th Cir. 1958), *rev'd*, 360 U.S. 25 (1959), and cases cited therein. *See also United States v. 67.59 Acres of Land*, 415 F. Supp. 544 (M.D. Pa. 1976).

B. The Eleventh Circuit Decision Can Be Affirmed On Statutory Grounds Alone

Based upon the foregoing, we submit that this case does not present a proper forum for deciding the constitutional issues raised by appellants in their briefs. The "taking" finding which forms the heart of the Eleventh Circuit decision was based upon agency conduct, not the Pole Attachment Act. It is a cardinal principle of law that important constitutional questions should not be decided in the absence of a need to make such a decision.[33] In this regard, statutes or regulations should not be invalidated on constitutional grounds if "a construction of the statute is fairly possible by which the question may be avoided."[34]

The parties to this proceeding have actually urged that such a construction is possible if this Court agrees that Congress, in enacting the Pole Attachment Act, intended an extremely limited delegation of authority. Therefore,

[33] *See County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1979), in which this Court observed:

> Federal Courts are courts of limited jurisdiction. They have the authority to adjudicate specific controversies between adverse litigants over which and over whom they have jurisdiction. In the exercise of that authority, they have a duty to decide constitutional questions when necessary to dispose of the litigation before them. But they have an equally strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration."

See also Mills v. Rogers, 457 U.S. 291, 305 (1982) ("It is this Court's settled policy to avoid unnecessary decisions of constitutional issues. . . .")

[34] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring, *quoting Crowell v. Benson*, 285 U.S. 22, 62 (1932). *See also Kent v. Dulles*, 357 U.S. 116, 129 (1958) ("Thus we do not reach the question of constitutionality. We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here.")

the constitutionality of the Pole Attachment Act itself is not really at issue. Rather, the Eleventh Circuit's finding that the FCC's actions with respect to Florida Power's poles encroached too far on Florida Power's property rights must be reviewed in the context of whether such conduct fell within the narrow authority delegated by Congress. The factual predicate for the Eleventh Circuit's decision is quite different than the FCC's description of proper conduct under the Pole Attachment Act, and the very narrow jurisdiction granted in the Pole Attachment Act is at significant variance with the specific facts of this particular proceeding. The conduct of the FCC at issue here cannot be reconciled with the limited authority granted under the Pole Attachment Act [35] and, thus the constitutional issues urged by the parties need not and should not be reached.[36]

C. The Constitutional Implications Of The Compensation Provisions Of The Pole Attachment Act Need Not Be Examined Because The Act Does Not Authorize The FCC To Take Private Property

It is, of course, true that the Eleventh Circuit invalidated the procedure established by the Pole Attachment Act as a vehicle for setting "just compensation" for the taking of Florida Power's property.[37] But the Eleventh Circuit ruled only that the compensation scheme set forth in the Act failed to pass constitutional muster *because* the FCC had utilized this procedure in an actual taking

[35] It is well settled that the FCC must operate within the confines of the jurisdiction delegated to it by Congress. *See Louisiana Public Service Commission v. FCC*, —— U.S. ——, 54 U.S.L.W. 4505, 4511 (1986).

[36] This is not to say that the Eleventh Circuit's constitutional conclusions were erroneous. But in this particular case, the judgment of the Eleventh Circuit can be affirmed without reaching the constitutional issues.

[37] *Florida Power Corp.*, 772 F.2d at 1544-46.

context.[38] The Eleventh Circuit expressly declined to rule on whether the FCC's actions could have been sustained had the FCC acted within the limits of the Pole Attachment Act.[39]

Thus, the question of how Congress might grant the FCC the authority to set "just compensation" should it grant the FCC the power to "take" private property, or how the FCC could properly perform this adjudicatory function, is not at issue here. Nor, for that matter, is the type of "formula" which could pass constitutional or statutory review in a non-taking context. The FCC does not have the power to "take" pursuant to the Pole Attachment Act, and, as noted, expressly disclaims such author-

[38] Both appellants contend that the recovery of "fully allocated costs" under the Pole Attachment Act provides Florida Power with just and reasonable pole attachment rates. Group W Brief at 10. FCC Brief at 22. Assuming that there has been a taking in this case, appellants' position incorrectly assumes that the "fully allocated costs" of Florida Power's poles provides Florida Power with just compensation, under the Fifth Amendment, for the taking of its poles by appellants. A court, in determining just compensation for a taking, must look to the full and perfect equivalent in money of the property taken, whereby the owner is placed in as good a financial position as he would have been in had the property not been taken. Such a determination may not lawfully be restricted to a "fully allocated costs" methodology. *See United States v. Miller*, 317 U.S. 369 (1943).

[39] *Florida Power Corp.*, 772 F.2d at 1546-47, n.6. It should be noted that the "formula" which the FCC utilized to set the rates which replaced the Florida Power contract rates has been invalidated by two other circuit courts. *See Texas Power & Light Co. v. Federal Communications Com'n*, 784 F.2d 1265 (5th Cir. 1986); *Alabama Power Co. v. Federal Communications Com'n*, 773 F.2d 362 (D.C. Cir. 1985). The FCC is now conducting a rulemaking to develop a new formula. *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, FCC 86-274 (released June 6, 1986). While not dispositive, we submit that the existence of this ongoing proceeding is likewise inconsistent with the FCC's position here that the Eleventh Circuit invalidated the entire Pole Attachment Act.

ity. Accordingly, if the Eleventh Circuit's decision that the FCC "took" Florida Power's property is correct, this "taking" was *ultra vires* in and of itself. Just compensation issues need not be reached because the question of just compensation only arises if the FCC has "taking" authority in the first instance. As the FCC's invalidation of the contracts of Florida Power exceeded its statutory jurisdiction, affirmance of the Eleventh Circuit's judgment in this regard should permit Florida Power to enforce its lawful contracts without implicating the constitutional rights of any party.

II. THE CONSTITUTION PROTECTS THE PROPERTY OF REGULATED UTILITIES FROM UNCOMPENSATED TAKINGS BY THE FEDERAL GOVERNMENT

Should this Court decide to address the constitutional issues raised by appellants, it then becomes important to focus on a key error in their constitutional analysis. Appellants' position is based in large part upon the assertion (express or implied) that the property of public utility companies is entitled to less constitutional protection against governmental takings than is the property of other companies. This notion is without legal or constitutional foundation. While the services which public utilities provide can be (and often are) subject to extensive governmental regulation, the property of such utilities remains under private ownership. As regulated utilities, MTN, NWB and PNB are not in the "business" of providing pole space to the general public. Rather, they provide telecommunication services to the public—and utility poles are private facilities utilized to facilitate the provision of those services.

As appellants note, when private property is devoted to public use it is subject to public regulation.[40] When

[40] *Munn v. Illinois*, 94 U.S. 113, 130 (1876). Note, however, the observation of Justice Brandeis that: "The thing devoted by the

such regulation involves the setting of rates for services, the utility is constitutionally entitled to a rate which enables it to earn a reasonable rate of return on the value of the property used to provide the utility services in question.[41] But this governmental ability to regulate rates for service has never been equated with a right to take utility property, or to regulate utility property in a manner which is equivalent to a taking. As this Court observed in *State of Missouri v. Public Service Commission*: [42]

> It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership.

This recognition of the basic property rights of utilities was similarly affirmed in *Board of Public Utility Com'rs. v. New York Telephone Co.*[43] in which this Court rejected the proposition that rate payers obtained property rights in utility property:

> Customers pay for services, not for the property used to render it . . . By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.[44]

investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise." *State of Missouri v. Public Service Commission*, 262 U.S. 276, 290 (1923) (Brandeis, J. dissenting from opinion but concurring in result).

[41] *See Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938); *Bluefield Waterworks & I. Co. v. Public Service Commission*, 262 U.S. 679, 692-3 (1923).

[42] *State of Missouri v. Public Service Comm'n, supra*, 262 U.S. 276, 289.

[43] 271 U.S. 23 (1926).

[44] *Id.* at 32.

The principle that utility private property rights do not labor under a diminished standard of constitutional protection was recently re-emphasized in two cases involving the First and Fifth Amendment rights of utilities. In *Consolidated Edison Co. v. Public Servi: e Commission of New York*, 447 U.S. 530, 540 (1980), this Court noted that the utility was using "its own billing envelopes to promulgate its views on controversial issues of public policy" and therefore invalidated the Public Service Commission's prohibition on utility company inserts. In *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, —— U.S. ——, 106 S. Ct. 903 (1986), this Court affirmed a utility's right to exclude the distribution of the viewpoints of others from its privately owned billing envelopes.[45] These decisions reaffirmed that public utilities enjoy the same First and Fifth Amendment rights as other businesses, and are inconsistent with the FCC's and Group W's assertion that the property rights of utilities enjoy only "second class" constitutional protection against a governmental taking.

In a similar vein, both the FCC and Group W assert that the *sine qua non* of a taking when utility property is involved is whether the "rate- established are not confiscatory."[46] This position confuses two quite different

[45] *See* plurality opinion, 106 S. Ct. at 912 ("The envelopes themselves, the bills, and '*Progress*' all remain appellant's property. The Commission's access order thus clearly requires appellant to use *its* property as a vehicle for spreading a message with which it disagrees.") (emphasis in original); Justice Marshall, 106 S. Ct. at 915, n.1 ("Having chosen to keep utilities in private hands, however, the State may not arbitrarily appropriate property for the use of third parties by stating that the public has 'paid' for the property by paying utility bills.")

[46] FCC Brief at 9-10; Group W Brief at 20. Group W makes the argument that the "taking" issue might depend on whether the property taken could be defined as a "bottleneck facility." Group W Brief at 22, n.51. While the existence of a "bottleneck facility" might be cause for rate regulation in some instances, such a situation clearly would not justify an uncompensated taking.

principles. The establishment of a confiscatory rate is itself a constitutional violation by the regulatory authority —i.e., an uncompensated taking. Thus, confiscatory ratemaking generally would fall within the constitutional parameters of regulation that "goes too far."[47] But an actual taking of property—as opposed to the overly zealous regulation of the use of property—is a different matter, and the private property of utilities share the basic constitutional protection against uncompensated takings to the full extent that such protection applies to all other owners of private property.[48] Thus, the government's responsibilities under the Constitution are quite different when it takes private property than when it regulates the use of such property.[49] This essential distinction was summarized in *West v. Chesapeake & Potomac Telephone Co.*,[50] as follows:

[47] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also MacDonald, Sommer & Frates v. Yolo County*, —— U.S. ——, 106 S. Ct. 2561, 2566 (1986).

[48] Group W presents a different version of this taking theory—namely, that no taking occurs upon government appropriation of regulated telephone utility property because the utility can recoup the loss from ratepayers through higher rates for local telephone service. Group W Brief at 7, 23. *See also* FCC Brief at 11. This approach is not accurate as a factual matter—losses from below value pole attachment rates for CATV companies are not automatically recouped by telephone companies, either in the short or long term. Furthermore, in the context of a physical invasion of property such as occurred here, Group W's legal proposition is erroneous—there is no support for the notion that the government may take utility private property without just compensation simply because the utility might be able to recoup some of the loss through increased charges to others who purchase services provided through the remaining property.

[49] The FCC does at times implicitly recognize this distinction. For example, the FCC concedes that:

> Because Congress was establishing a rate regulation system, not providing for the taking of property, it did not expressly provide that the 'just and reasonable rate' should constitute the nature of just compensation. FCC Brief at 21.

[50] 295 U.S. 662 (1935).

> The established principle is that as the due process clauses (Amendments 5 and 14) safeguard private property against a taking for public use without just compensation, neither Nation nor State may require the use of privately owned property without just compensation. When the property itself is taken by the exertion of the power of eminent domain, just compensation is its value at the time of the taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value.[51]

It is the failure to recognize this fundamental difference which leads appellants to derive the erroneous notion that utility property is not fully protected under the Constitution from caselaw discussing the parameters of service regulation.

Group W makes a similar argument that a utility which enters into a contract invariably does so with the foreknowledge that the other party to the contract may be able to avoid paying the contract rate.[52] This position likewise reflects a failure to grasp the distinction between legitimate regulation of services and taking of property. The contracts invalidated by the FCC in this proceeding were not for common carrier services (or for interconnection with common carrier services). They instead were for physical occupancy of private property in a manner which, by its very nature (due to physical limitations of utility poles) excluded other uses of the occupied space. When a utility sells or leases its private property under these conditions, there is no legal precedent for the proposition that it can reasonably anticipate that its contract is not binding—and the cases cited by Group W, which deal with contracts for carrier services are not to the contrary.[53]

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[51] *Id.* at 671.

[52] Group W Brief at 28-30.

[53] Group W Brief at 28-29, n.65. The lead case relied upon by Group W for this proposition, *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109 (1937), in context, supports the distinction we draw here. The passage from *Midland* quoted by Group W continues as follows:

> But the State has power to annul and supersede rates previously established by contract between utilities and their customers. It has power to require service at nondiscriminatory rates, to prohibit service at rates too low to yield the cost rightly attributable to it, and to require utilities to publish their rates and to adhere to them. *Id.* at 113 (footnotes omitted).

Midland simply reaffirms basic principles of carrier *service* regulation. It does not support the proposition that a utility's contracts for use of its facilities are presumptively subject to reversal by a regulator.

Finally, the FCC seems to argue that there would be no taking of utility property even if utility owners of poles could not evict CATV companies, likening this proceeding to rent control statutes which restrict the eviction of tenants.[54] The FCC predicates this argument on *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983). In *Fresh Pond*, this Court dismissed an appeal of a decision of the Supreme Judicial Court of Massachusetts. The entire opinion of the eight justice majority reads:

> The appeal is dismissed for want of a substantial federal question.[55]

The entire opinion of the Massachusetts Supreme Court below reads:

> The judgment of the Superior Court is affirmed by an equally divided court. Justice Wilkins took no part in the decision of the case. He is a member of the Board of Overseers of Harvard College which may have an interest in the disposition of issues raised in this case.[56]

The lower Massachusetts Court decision has not been published.

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[54] FCC Brief at 19-20.

[55] *Fresh Pond*, *supra*, 106 S.Ct. at 218.

[56] *Fresh Pond Shopping Center, Inc. v. Rent Control Board of Cambridge*, 446 N.E.2d 1060 (Mass. 1983).

While Justice Rehnquist issued an opinion in dissent to the dismissal of the appeal when it was before this Court, we submit that *Fresh Pond*, a case without any published majority (or plurality) opinion at any level, cannot control the sensitive constitutional issues raised by appellants. It certainly cannot be assumed that "eight Members of the Court" [57] reached any specific conclusions about these constitutional issues, as is asserted.

CONCLUSION

For the foregoing reasons, MTN, NWB and PNB submit that the Eleventh Circuit's decision reversing the FCC Order under Review should be affirmed.

Respectfully submitted,

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August 29, 1986

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[57] FCC Brief at 20.

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Nos. 85-1658, 85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Appellants,
v.
FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
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v.
FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeals from the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE*

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

This case is an appeal from a decision of the United States Court of Appeals for the Eleventh Circuit

(hereinafter, the "Eleventh Circuit") holding unconstitutional the provisions of the Pole Attachments Act, 47 U.S.C. § 224, prescribing the maximum amount of compensation payable to a public utility for the physical attachment of television cables to its poles. Although the Pole Attachments Act by its terms does not apply to railroads, 47 U.S.C. § 224(a)(1), railroad property ca be used for non-rail-transportation purposes, which uses may raise issues analogous to those in this case.

The Association of American Railroads ("AAR"), an unincorporated association headquartered in the District of Columbia, is the largest organization of railroads in the United States.[1] AAR members carry over 95 percent of the Nation's railroad freight. Class I (major) railroads control more than 150,000 linear miles of right-of-way, on which their tracks are laid. *Railroad Facts 1985 Edition* 42. These rights-of-way span the continent, connecting cities and towns in all of the 48 contiguous States.

AAR has a direct interest both in the authority of government to regulate non-rail uses of railroad rights-of-way, and in the manner in which that authority may be exercised. The position of railroads as owners of rights-of-way is in many ways like that of Appellee Florida Power as an owner of utility poles. The primary use of the rights-of-way, for operating railroads, is subject to government regulation, as is Florida Power's use of its poles in connection with

[1] AAR files this brief by the consent of the parties, pursuant to Rule 36.2 of the Rules of this Court. The parties' letters of consent have been filed with the Clerk.

transmitting electricity.[2] And, just as Florida Power's poles are useful for secondary, non-utility purposes such as attachment of television cables, so rail rights-of-way may be useful for secondary, non-rail purposes such as installation of communications facilities, pipelines, or other items. For example, the Federal Communications Commission ("FCC") has in several cases authorized the construction of fiber-optic communications systems (which can carry high-speed data transmissions and voice communications) in railroad rights-of-way.[3] It is often more efficient for new uses to share existing rights-of-way than to require the construction of all-new pathways; society thereby benefits by deriving additional value from the more productive use of existing assets. Regulation may have a substantial effect on society's ability to obtain these economic benefits, particularly with respect to the efficient deployment of new communications technologies.

AAR supports the affirmance of the Eleventh Circuit's decision; however, we shall not repeat in this

[2] There are substantial differences between the regulation of railroads and of electric utilities. Most significantly, railroad rates are subject to regulatory limitation only in limited circumstances. *See* 49 U.S.C. § 10701a. Railroads, unlike most public utilities, are subject to competition in nearly all of the markets they serve. *See* Staggers Rail Act of 1980, Pub. L. 96-448, § 2(3), 94 Stat. 1895, 1896 (1980). Nonetheless, railroads, like public utilities, are subject to comprehensive regulatory schemes.

[3] *See, e.g., Lightnet*, 58 R.R.2d (P&F) 182, 183 (1985). Indeed, fiber-optic systems can also be attached to utility poles, ducts, and rights-of-way. *See Institutional Communications Co.*, 54 R.R.2d (P&F) 1178, 1179 n.1 (1983). The Pole Attachments Act, however, does not apply to attachments for any purpose other than cable television. 47 U.S.C. § 224(a)(4).

brief the arguments presented by Florida Power and the other Appellees in their briefs on the merits. Rather, AAR submits this *amicus* brief to respond to suggestions made by the Solicitor General and the FCC that could tend to expand the issues in this case beyond those necessary to its decision.

SUMMARY OF ARGUMENT

The narrow constitutional issue in this case is whether Congress, having chosen to require that pole attachments be permitted on "just and reasonable" terms and conditions, may prescribe a binding rule for determining the compensation to be paid for that compelled use of private property. Whether the Court finds the challenged aspect of the Pole Attachments Act valid or not, it need not address in this case the merits of government regulation of non-utility uses of utility property, or the standards for efficient or equitable allocation as between shareholders and ratepayers of the return on the economic value of those uses.

Utility assets can sometimes be used to produce ancillary non-utility services at less cost than those services would require if produced with separate assets. Regulators must determine whether and to what extent the additional value derived from the non-utility use of the asset should benefit ratepayers (by reducing the cost of utility service) or shareholders (by increasing their overall return on investment). Although the Pole Attachments Act requires the attribution of some pole costs to cable television users, the Government's characterization of the Act as a "typical" regulatory scheme is inaccurate. The Government contends that there can be no facial constitutional infirmity in the Act without calling into question standard regulatory practice; to hold the Act unconstitutional, so the argument goes, would bar the regulatory treatment of choice.

By arguing that the Act incorporates a traditional regulatory choice, the Government invites the Court to base its decision on an unnecessary assumption as to the acceptability or wisdom of such attribution of costs in general. Because this case involves only Congress' prescription of an upper limit of compensation, and not the merits of the underlying decision to regulate pole attachments, we urge the Court to avoid sanctioning the Act as a typical or desirable scheme of regulation.

ARGUMENT

I. The Government's Argument Concerning Allocation Of Pole Costs Implicates Issues That Are Not Properly Before The Court

In the Pole Attachments Act, Congress chose to regulate the use of utility property (poles) for non-utility purposes. At the time the Act was adopted, the rates charged by utilities for pole attachments generally were not regulated by the States, unlike their rates for electric or telephone services. S. Rep. No. 580, 95th Cong., 1st Sess. 17 (1977). Nearly all States had determined that pole attachments were not utility services, and were not within the jurisdiction of regulatory agencies under State law.[4]

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[4] *See, e.g., Ceracche Television Corp. v. New York Pub. Serv. Comm'n*, 49 Misc. 2d 554, 267 N.Y.S.2d 969, 973 (N.Y. Sup. Ct. 1960); *International Cable T.V. Corp. v. All Metal Fabricators, Inc.*, 66 P.U.R.3d 446, 463 (Cal. P.U.C. 1966); *WCOG*,

Congress overrode the decision of those States to treat pole attachments as unregulated services, and dictated an allocation of pole costs between ratepayers and cable television companies. The issue before the Court is whether the prescription of a statutory limitation on compensation is constitutionally permissible. The issue is not the more general regulatory policy issue of how ancillary uses of utility assets should be treated in the absence of such a statutory prescription.

The use of utility assets for multiple purposes raises issues of the proper allocation of costs and benefits. Under well-established principles of public utility law, the total amount a utility may charge its ratepayers is limited to the cost of providing its utility service, including the cost of the capital used in producing the service (the "return on investment").[5] Where the same assets are used to produce multiple utility services (*e.g.*, local and long-distance telephone service), the regulatory authority may choose to allocate costs among the various services in order to prescribe reasonable rates for each (although it may also consider other variables). Similarly, where the utility assets are used in part to produce an unregulated service, the regulator seeks to set rates for utility customers that

Inc. v. Southern Bell Tel. & Tel. Co., 64 P.U.R.3d 314, 317 (N.C. Util. Comm'n 1966). The adoption of the Pole Attachments Act did not necessarily alter State law limiting the definition of "utility" services. *Illinois-Indiana Cable Assoc., Inc. v. Indiana Pub. Serv. Comm'n*, 427 N.E.2d 1100, 1110-12 (Ind. Ct. App. 1981). Therefore, the FCC's determination of pole attachment rates does not necessarily affect the State's regulation of utility rates.

[5] *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

do not cross-subsidize, and are not improperly increased by, costs properly attributable to other services. *See Oklahoma Natural Gas Co.*, 52 P.U.R.3d 180, 181-82 (Okla. Corp. Comm'n 1963), *aff'd sub nom. Oklahoma ex rel. Nesbitt v. Oklahoma Natural Gas Co.*, 406 P.2d 273 (Okla. 1965).

Rational cost attribution presents little problem where, as a matter of fact, the non-utility uses impose new costs, whether fixed or variable. For example, the new use may impose costs for attachment devices, protective equipment for the existing system, and legal costs in perfecting easements originally granted for the utility purposes. Economic theory teaches that efficiency is served by attributing costs to those who cause them. Regulatory agencies do not require utility ratepayers to pay costs that are caused by non-utility activities.

Often, however, the costs of utility assets are not significantly increased by non-utility uses. The cost of right-of-way, or of an electric or telephone pole, may be largely unaffected by the attachment of coaxial or other cable; indeed, most pole costs are the same regardless of whether the pole is used for electric, telephone, or television service, or for any combination of these in any proportion. These are "joint" or "common" costs, and efficiencies result from use of the joint and common costs to produce multiple services ("economies of scope"). *See* 1 A. Kahn, *Economics of Regulation* 77-79 (1970). No single use of the pole "causes" the joint or common costs in the "but for" sense of causation.

When economies of scope exist, the regulator must decide whether the value of the non-utility use of a regulated asset should benefit the utility's sharehold-

ers or its ratepayers. Absent the ancillary use, of course, the entire cost of the pole or other asset would be included in the utility's revenue requirement. If some portion of the joint or common cost is attributed to a non-utility service, then the regulator may justify reducing utility rates; to that extent, ratepayers benefit from the non-utility use. In that case, the total earnings of the utility do not necessarily increase by reason of the ancillary use, but the revenue requirement is divided between ratepayers and non-utility users of the asset. By contrast, if joint and common costs remain in the utility's cost of service, its shareholders will benefit from the return (if any) generated by the non-utility use, just as they would in any unregulated enterprise.

The Pole Attachments Act allocates benefits to utility ratepayers by assigning a portion of pole costs to cable television users, even though those costs would have had to be paid even in the absence of the cable attachment. The United States and the FCC seem to suggest in their brief on the merits ("Govt. Br.") that the choice is typical—that regulators ordinarily reallocate the benefits of ancillary uses of utility assets:

> The utility's total annual revenue is typically fixed by the state agency to reflect its perceived overall revenue requirements. *Funds derived from pole attachment fees help defray costs that would otherwise be borne by the utility's customers.* The determination of the proper allocation of costs between different kinds of utility customers is the essence of the business of utility regulatory agencies. In this context, *the cable companies are in effect simply another kind of customer,* and state regulation of the rates charged them by the utilities would be no less consistent with the Just Compensation Clause than is any other component of the state rate regulation scheme.

Govt. Br. 11 (emphasis supplied). This passage suggests that the decision below implicates all rate setting by regulatory agencies. Allocation of costs among customers is a typical regulatory function, so the argument goes; the efficient or fair approach is to treat the cable operator as simply another customer; and the Act performs a typical regulatory function in deciding how certain costs are to be attributed to that customer.[6] Accordingly, the Government contends, there can be no facial constitutional infirmity in the Act without calling into question standard regulatory practice; to hold the Act unconstitutional would bar the regulatory treatment of choice; and any proper constitutional challenge involving the Act could concern only whether a particular rate was confiscatory.

The Government's portrayal of supposedly typical regulation, in combination with the impact of decisions by the Court on rate regulatory issues generally, seems to invite the Court to speak in terms that

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[6] In similar vein, the federal appellants reject as "overdrawn and wholly immaterial for purposes of allocating pole costs among the users" Florida Power's argument that in leasing space on its poles "it is acting not 'in its role as a public utility rendering electric service to the public, but rather in its non-utility role as a renter of space on its property * * *.'" Govt. Br. 11, n.12. We would note, however, that in many cases regulators have found this distinction to be highly material for purposes of allocating costs. *See Oklahoma Natural Gas Co., supra,* and cases cited *supra* note 4.

appear to sanction regulatory transfers of the returns from non-utility uses as a matter of theory and practice. Any such doctrinal consequences would be premature and unwise. The Court can, of course, agree or disagree that the Act encroaches upon Article III powers without deciding whether the regulation of ancillary uses of utility property is preferable or required as a matter of general regulatory theory.[7] AAR's purpose in this brief is to suggest that, however the Court resolves the constitutional issue, it make unmistakably clear that it is not resolving or even addressing the allocation issue.

In most constitutional cases, there would be no need for such concern. It is well understood that when the Court passes on the constitutionality of a statute, it is making no judgment as to the wisdom of the statutory policy. Constitutional holdings in rate cases are different, however. The Court's pronouncements on constitutional aspects of ratemaking have often dominated ratemaking law and theory at both the federal and state level. Such cases as *Smyth v. Ames*,[8] Justice Brandeis' concurrence in *Southwestern Bell Telephone*,[9] *Bluefield Water Works*,[10] and *Hope Natural Gas*,[11] attained significance not only as statements of

[7] The Court could also decide whether the rate that results under the statutory formula is confiscatory without deciding whether such formulaic allocation is proper or preferable as a matter of general rate theory.

[8] 169 U.S. 466 (1898).

[9] *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 290 (1923).

[10] *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679 (1923).

[11] *Supra* note 5.

constitutional boundaries but as paradigms of regulatory theory and policy. It would be most unfortunate if, en route to its decision concerning the constitutionality of this Act, the Court said anything about allocation that attained comparable significance.

The Government's suggestion that the Pole Attachments Act represents a "typical" (and, by further implication, efficient and fair) regulatory scheme papers over a far more complex reality. In the following section, we will show that there is no standard practice or generally applied theory regarding allocation of the benefits of non-utility uses, and discuss some of the more important factors that may affect a particular regulatory decision. In doing so, we do not suggest or seek a resolution of the issues, but intend to illustrate that their unsettled nature belies the Government's assertion that the Act reflects a settled or indisputably preferable regulatory practice.

II. The Allocation Of Utility Costs Requires Consideration Of Numerous Factors That Are Not Contained In The Record, Have Not Been Briefed, And Often Reflect A Particular Regulatory Context

The allocation of joint and common costs is more than a matter of accounting technicalities—it raises issues central to the relationship between a utility and its customers and to the public interest in that relationship. A fundamental underlying issue is whether stockholders who invest in utility assets retain essential ownership rights in their property, including the right to exploit new, valuable uses of that property.

Relieving ratepayers of the need to pay for joint and common costs transfers to them part of the value of the utility's assets, as if they were the owners of the assets. This Court has stated, however, that the

utility-ratepayer relationship does not vest ratepayers with any interest in the assets used to produce the utility service. In *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926), the Court said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. *By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience* or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock.

271 U.S. at 32 (emphasis supplied). Correspondingly, the government limits the return that investors may earn on utility uses of their assets, but does not deprive them of the right to exploit other uses. As Justice Brandeis remardmark currence in the *Southwestern Bell* case,

> [t]he several items of property constituting the utility, taken singly, and freed from the public use, may conceivably have an aggregate value greater than if the items are used in combination. The owner is at liberty, in the absence of controlling statutory provision, to withdraw his property from the public service; and, if he does so, may obtain for it exchange value.

262 U.S. at 290. Although Justice Brandeis referred to the sale of assets, the same conclusion applies when

the owner can exploit the non-utility value of an asset without withdrawing it from utility service.[12] The key distinction is between the owner's ability to recover appreciation in the value of the utility property *from ratepayers*, and the ability to recover that appreciation from purchasers of other uses of the property.

The *New York Telephone* conceptualization of the ratepayer-utility relationship tends to support allocation to shareholders of the economic value of non-utility uses. It has been so applied, for example, by the Federal Energy Regulatory Commission ("FERC") with respect to sales of appreciated utility property. Where such sales are at prices that exceed the depreciated original cost of the utility asset, FERC allocates the gain to shareholders. *See Virginia Electric & Power Co.*, 27 FERC (CCH) ¶ 61,093, *reh'g denied*, 27 FERC (CCH) ¶ 61,406 (1984); *Duke Power Co.*, 48 F.P.C. 1384, 1394-95 (1972); Order No. 473, 49 F.P.C. 390, 391 (1973).[13]

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[12] Indeed, a lease of an asset may be viewed as economically equivalent to a sale. The sale price in this case is the discounted present value of the rental income stream. The timing or legal form in which economic value is realized should not affect the allocation as between shareholders and ratepayers.

[13] The *New York Telephone* conceptualization has also had a broad effect on regulatory practices in many contexts other than the use of utility assets for non-utility purposes. *See, e.g., Secretary of Defense v. Chesapeake & Potomac Tel. Co.*, 217 Va. 149, 225 S.E.2d 414 (1976) (rejecting contention that rates must be based solely on cost of service); *General Motors Corp. v. Public Serv. Comm'n*, 95 A.D.2d 876, 463 N.Y.S.2d 886, 888 (1983) (rejecting contention that electric utility customers are entitled to "the benefits of the lower running costs of the plants for which their rates have paid").

Other jurisdictions have allowed shareholders to retain the benefits of non-utility uses based on an analysis of cost causation. They have concluded that costs that would be incurred in the absence of a non-utility use should continue to be included in the regulated cost of service, even though those costs may also benefit the non-utility use. *See, e.g.*, *City of El Dorado v. Arkansas Public Service Commission*, 235 Ark. 812, 362 S.W.2d 680, 685 (1962) (rejecting argument that ratepayers of a local gas utility should be relieved of transportation costs that "would accrue whether the gas is processed [the unregulated activity] or piped directly to utility customers").

Various other issues may affect allocation decisions. For example, if benefits from non-utility uses were allocated to ratepayers, utility managements might be indifferent to non-utility uses, in which event ratepayers would continue to bear the costs of excess capacity or otherwise fail to benefit from non-utility uses. *See, e.g.*, *Casco Bay Lines v. Public Utilities Commission*, 390 A.2d 483, 489-90 (Me. 1978) (allowing 90 percent to ratepayers of gain from sale of appreciated utility assets but reserving ten percent to shareholders to create appropriate managerial incentives). Furthermore, if the economic value of non-utility uses were permitted to influence utility rates, regulatory agencies might be drawn into unwanted or unauthorized regulation of otherwise unregulated markets. *See Oklahoma Natural Gas Co.*, *supra*, 52 P.U.R.3d at 182.[14]

[14] Regulatory agencies do regularly examine utility dealings with affiliated entities that either supply or purchase from the utility, but dealings with affiliates are a special case.

Even in those cases where regulators have chosen to allocate some portion of joint and common costs to non-utility services, they have used many different methods of allocation. In the absence of cost causation, agencies may resort to accounting conventions based on various notions of efficiency or fairness.[15] Costs may be allocated among services based upon some measurement or estimate of usage. *See MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 410-11 (D.C. Cir. 1982). The upper limit in the Pole Attachments Act is one variant of this accounting approach to "fully allocated" cost. It is generally recognized, however, that no accounting allocation can achieve "purely economic" results. *Id.* at 415-16. An alternative approach holds that economic efficiency, or the allocation of resources to their most-valued uses, is maximized by letting those who value the service the most pay the most. Under this approach, joint and common costs are generally allocated in inverse relation to the elasticity of demand; they are allocated to the most demand-inelastic users of the assets. *See, e.g.*, *Coal Rate Guidelines—Nationwide*, 1 I.C.C.2d 520 (1985). Such value-of-service allocation techniques have long been used, albeit less quanti-

[15] Regulators have developed two ways of transferring to ratepayers the benefits of non-utility uses. The first method leaves the assets entirely in the utility rate base, but credits revenues received from non-utility uses to the revenue requirements of the utility. To the extent that revenues are so credited, ratepayers are relieved of the necessity to meet the utility's entire revenue requirement. The second method of allocation removes some portion of the assets from the rate base. The revenue requirement borne by ratepayers is reduced by the portion of operating expenses and the cost of capital attributable to the assets so removed.

tatively, in setting telephone rates. *See Secretary of Defense v. Chesapeake & Potomac Telephone Co., supra* note 13.

Some courts have approached allocation matters on a more *ad hoc* basis. In cases where the court believed that the ratepayers bore the risk of loss on particular investments, ratepayers have been held entitled to the benefits of any profit produced by that investment. *See, e.g., Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786, 806 (D.C. Cir. 1973); *cert. denied sub nom. D.C. Transit System, Inc. v. Democratic Central Committee*, 415 U.S. 935 (1974); *New York Water Service Corp. v. New York Public Service Commission*, 12 A.D.2d 122, 208 N.Y.S.2d 857, 863-64, 37 P.U.R.3d 442, 447-48 (1960), *appeal denied*, 13 A.D.2d 610, 214 N.Y.S.2d 667 (1961). Some jurisdictions consider whether depreciation expense was included in the utility's cost of service, and allocate some or all gains upon sale of depreciated assets to ratepayers. *See, e.g., Boise Water Corp. v. Idaho Public Utilities Commission*, 99 Idaho 158, 578 P.2d 1089, 1092-93 (1978) (gain on sale of nondepreciable land allocated to shareholders); *Wyoming Gas Co.*, 40 P.U.R.3d 509, 513 (Wyo. Pub. Serv. Comm'n 1961) (gain on sale of depletable gas reserves allocated to ratepayers).

CONCLUSION

The question of what constitutes an efficient or equitable allocation of the economic value of non-utility uses of utility assets is not before the Court. The question has not been briefed by the parties; AAR's summary in this brief is intended to illustrate the scope of the subject and some of the disparities and

complexities, but does not seek a resolution. Nor is resolution of the question necessary to a decision on the question that is before the Court—whether Congress may statutorily impose an upper limit of compensation for a taking. AAR respectfully asks that the Court avoid any opinion on the merits of the allocation question as a matter of general regulatory theory.

Respectfully submitted,

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